

89-1848

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1989

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.

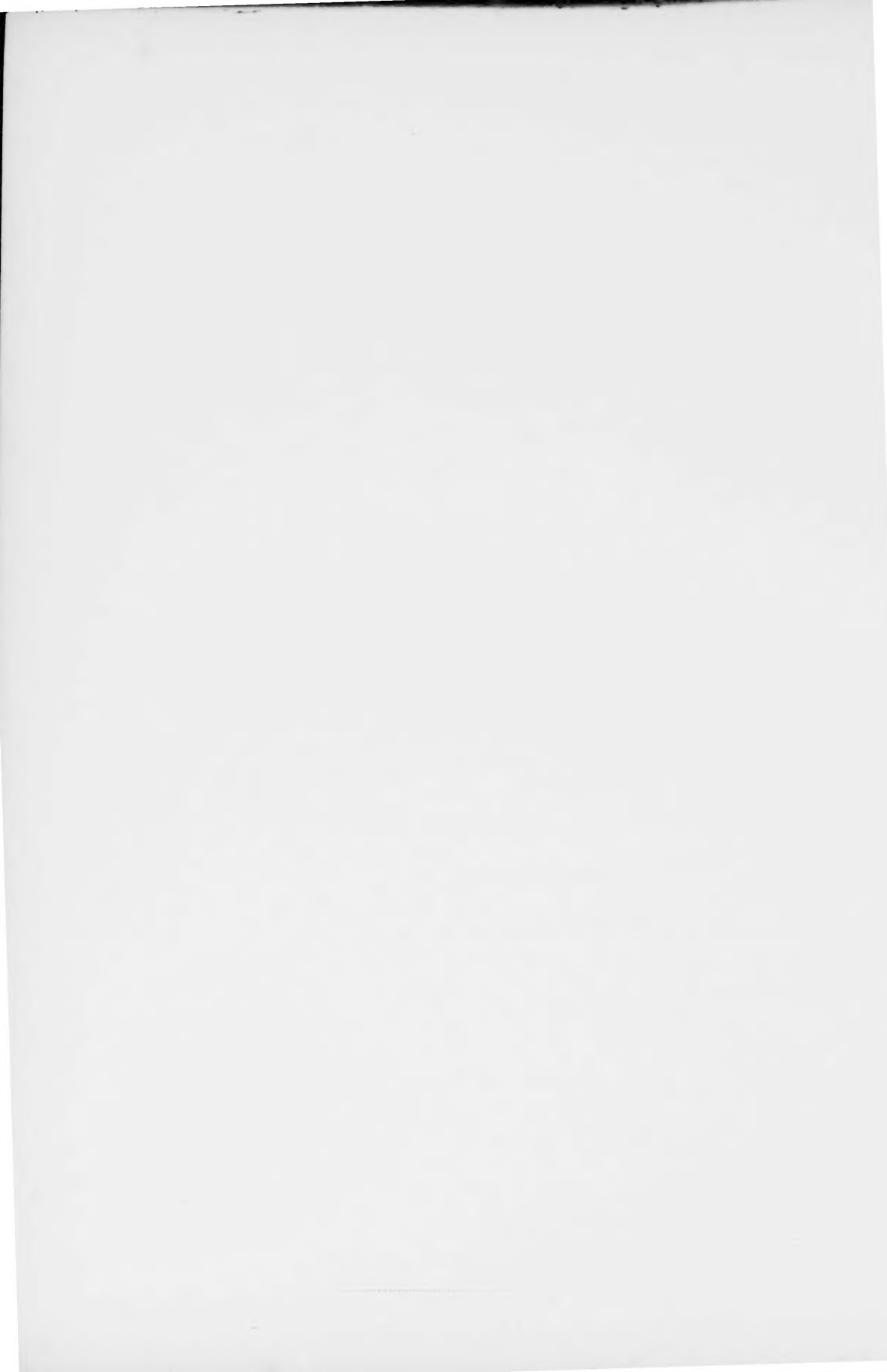
ALBERT LEE III,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

WILLIAM A. FORSYTH (P 23770)
Prosecuting Attorney, Kent County,
Michigan
Of Counsel

TIMOTHY K. McMORROW (P 25386)
Chief Appellate Attorney
Counsel of Record

Business Address:
416 Hall of Justice
333 Monroe Ave. NE
Grand Rapids, MI 49503
(616) 774-3577



QUESTION PRESENTED

DOES THE HYPNOSIS OF WITNESSES DEPRIVE A DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO CONFRONT THOSE WITNESSES, WHERE THE DEFENDANT IS PERMITTED TO FULLY CROSS EXAMINE THE WITNESSES AND TO PRESENT EXPERT TESTIMONY ON THE POTENTIAL EFFECT OF HYPNOSIS ON MEMORY?

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**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN**

NOW COME the People of the State of Michigan, by the Prosecuting Attorney for the County of Kent (Timothy K. McMorrow, Chief Appellate Attorney), and pray that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered in the above entitled cause on January 10, 1990, Rehearing denied February 29, 1990.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (1a) is published as *People v Lee*, 434 Mich 59 (1990). The order

denying rehearing (81a) is reported at 434 Mich 1203 (1989). The opinions of the Michigan Court of Appeals (82a and 84a) are unpublished.

STATEMENT OF JURISDICTION

The judgment of the Michigan Supreme Court was entered January 10, 1990. Timely Filed Petition for Rehearing was denied by the Michigan Supreme Court on February 29, 1990. The jurisdiction of this Court is invoked under 28 USC sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

" . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent was charged with and convicted by jury of the murder of eleven-year-old Linda Vanderveen. Linda was abducted from her post as a school crossing guard in the early morning hours of February 12, 1979. Her body was found a few miles from the site of the abduction late that same afternoon. Cause of death was ligature strangulation. (9a-10a)¹ Autopsy revealed evidence of trauma to the vagina and anal sphincter, although there was no proof of sexual molestation.

There were seven prosecution witnesses who were hypnotized. (10a) It is undisputed that the witnesses made no identification of Respondent until after the hypnosis session. It is also clear that, with one exception, the witnesses were hypnotized before Respondent was a suspect in the murder.

On the day of the abduction, witness Jack Hill saw a man at the scene "pushing something into a car." (T 98) This was a big black car. He then saw a young girl in the back of the car "waving frantically." (T 104) Hill identified Respondent at trial as the man. (16a) Respondent

¹ References will be to the appendix where the Michigan Supreme Court stated the appropriate fact. References to matters not specifically contained in the Michigan Supreme Court opinion will be to the trial transcript.

jumped in his car and drove away quickly. Hill tried to follow, but lost the Respondent. (T 112) Witnesses in another car also saw a girl in the car "jumping up and down waving her hands." (T 228) One witness, Jack Vos, who was a passenger in a car being driven by his father, said Respondent looked identical to the man he saw driving the black car, but that he couldn't say the Respondent was the man. (17a)

The car in question was variously described as a Monte Carlo or a Grand Prix, but was consistently described as black in color. One witness, the manager of an automobile leasing company, testified that the car was a black Grand Prix. (T 291, 294)

The witnesses viewed three books of photographs. The first book contained 152 photographs, including a picture of Respondent. The second book contained 88 photographs, but not that of the Respondent. Respondent appeared in two lineups viewed by Jack Hill and Jack Vos; at the first lineup, his hair style was considerably changed from the time of the crime, and no one identified him. (15a, n 14) Respondent was positively identified by Jack Hill and tentatively identified by Jack Vos at the second lineup. (15a)

Several reddish-orange carpet fibers were found on the body of Linda Vanderveen. These fibers matched the fibers from the carpet in Respondent's car. (T 922-923) They could not have come from the Vanderveen family car, nor from the ambulance that transported Linda's body. (T 894-895) Blond hairs found in Respondent's car matched a sample of Linda's hair, indicating that they could have come from her head. (T 949-950) Linda's

knapsack was found in a rubbish container in an apartment complex one mile from where her body was found and red fibers consistent with Respondent's car carpet were found on the knapsack as well. (T 1148) There were feathers found in Respondent's car, which were the same type as from Linda's mitten. (T 1158) Linda had left for school that day wearing two barrettes in her hair. Only one barrette was found in her hair at autopsy. Another barrette was found in Respondent's car. These barrettes were of the same type, turquoise colored and manufactured by the same company. The barrette from Linda's hair and the one found in Respondent's car were similar and could have come from the same package. (T 1114-1115, 1128)

Several witnesses in the case had been subjected to hypnotic sessions prior to viewing the photographic books and lineups. Most of the witnesses felt in fact that they had not been hypnotized. The evidence indicated that the witnesses were placed in at most a light trance. (T 1723)

Respondent presented Dr. Martin Orne as an expert witness on the effects of hypnosis. Dr. Orne testified that Jack Hill and Jack Vos did not identify Respondent from memory, since they should have identified Respondent from pictures of him they saw after the incident if their identifications were based on memory traces. But Dr. Orne also testified that he had never seen the pictures of Respondent as they appeared in the photographic identification books, and agreed that Respondent's appearance at the first lineup was considerably different from his appearance at either the second lineup or his understanding of his appearance on February 12, 1979. (T 1634-1636)

The Michigan Court of Appeals affirmed Respondent's conviction of first degree murder. The case was later remanded back to the Court of Appeals for reconsideration in light of the intervening Michigan Supreme Court opinion of *People v Nixon*, 421 Mich 79; 364 NW2d 593 (1984). The Court of Appeals on reconsideration again affirmed the conviction. The Michigan Supreme Court then granted leave to appeal, and reversed Respondent's conviction. The Court held that the testimony of witnesses who had been hypnotized was tainted and was thus inadmissible into evidence.

REASONS FOR GRANTING THE WRIT

Petitioner submits that this case raises the question of whether hypnotism of witnesses deprives a defendant of his constitutional right to confront witnesses. Prior precedents of this Court, albeit in different contexts, state that the right to confrontation only gives the defendant the right to cross-examine a witness, not the right to successful cross examination under any and all circumstances. The Michigan Supreme Court has held to the contrary: that the defendant's ability to confront witnesses has been deprived because of the manner in which hypnotic sessions were undertaken. Petitioner submits this is an issue on which this Court should grant certiorari.

The opinion of the Michigan Supreme Court addresses the question in terms of the reliability of the testimony of witnesses who have been hypnotized. At first blush, this may appear to present only a question of state evidentiary law, and not a constitutional issue. But a

Careful reading of the opinion shows this is not so. The Court concedes (8a) that its opinion is based on the prior Michigan precedents of *People v Gonzales*, 415 Mich 615; 329 NW2d 743 (1982), modified 417 Mich 986; 336 NW2d 751 (1983), and *People v Nixon*, 421 Mich 79; 364 NW2d 593 (1984). The Court in this case cited with approval (19a) the following statement from *Gonzales*, also cited with approval in *Nixon*:

"The process of hypnosis is not a reliable means of accurately *restoring forgotten incidents or repressed memory*, and to permit posthypnotic testimony would unfairly denigrate the defendant's right to cross-examination. Therefore, we hold that until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses *which has been tainted by hypnosis* must be excluded in criminal cases." [*People v Nixon*, *supra* at 88, quoting *People v Gonzales*, *supra* at 626-627 (emphasis in original)]

Respondent in the Michigan Supreme Court argued extensively that permitting hypnotized witnesses to testify would deprive him of his right to confrontation. (See Respondent's brief in the Michigan Supreme Court, pp 9, 13) The above quotation leaves little doubt that the Michigan Supreme Court accepted that argument and viewed the question of hypnosis as raising a Confrontation Clause issue.

People v Nixon did hold that the mere fact of hypnosis did not automatically preclude effective cross-examination, *People v Nixon, supra* at 91; this holding, however, assumes that *effective* cross-examination is necessary to protect a defendant's confrontation right. The holdings of *Nixon* and *Gonzales*, reaffirmed in the instant case, are at odds with this Court's analysis of the Confrontation Clause.

In *Delaware v Fensterer*, 474 US 15; 106 S Ct 292; 88 L Ed 2d 15 (1985), this Court determined that there was no Confrontation Clause violation when an expert witness testified as to the opinion he had formed, but was unable to recollect the basis on which he had formed it. The Court said:

"The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to prove and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness's testimony." [*Delaware v Fensterer, supra*, 474 US at 21-22]

Subsequently, in *United States v Owens*, 484 US 554; 108 S Ct 838; 98 L Ed 2d 951 (1988), this Court considered the Confrontation Clause in a different context. The defendant was convicted of assault with intent to murder. The victim was left with a severely impaired memory due to the assault. At trial he said he remembered identifying the defendant as the attacker, but could not at trial remember seeing the attacker, could not remember whether

anyone had suggested to him that the defendant was the perpetrator. He had apparently once attributed the assault to someone else. This Court applied the holding of *Delaware v Fensterer* and observed the following:

"It is sufficient that the defendant has the opportunity to bring out such matters as the witness's bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination [citation omitted]) the very fact that he has a bad memory. If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness's past belief is introduced and he is unable to recollect the reason for that past belief. In both cases the foundation for the belief (current or past) cannot effectively be elicited, but other means of impugning the belief are available. [*United States v Owens, supra*, 484 US at 559]

This Court has thus clearly held that a defendant's right to confrontation is not deprived merely because a witness's testimony is affected by some external event. As applied to the instant case, the fact that witnesses were hypnotized, while undoubtedly a factor which the defense can exploit to argue against the value of the testimony, does not deprive the defendant of his right to confront the hypnotized witnesses. The confrontation right can be satisfied by cross-examination of the witnesses concerning the hypnotic sessions, and the presentation of expert testimony on the effect of hypnosis on memory.

It is unconvincing to argue that the instant case was simply an application of Michigan law and thus based on an independent and adequate state ground. The Michigan Supreme Court did not state that it was deciding this case on the basis of Michigan law, *Michigan v Long*, 463 US 1032, 1038-1041; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). Furthermore, when the Michigan Supreme Court has addressed Confrontation Clause issues, it has always applied the rulings of this Court. See e.g. *People v Kirtdoll*, 391 Mich 370; 217 NW2d 37 (1974).

In the interest of a complete presentation of the issue, we wish to note further this Court's opinion in *Rock v Arkansas*, 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987). In *Rock*, this Court held that a state could not preclude a hypnotized defendant from testifying to facts recalled only under hypnosis. The defendant in *Rock* was charged with manslaughter for the shooting death of her husband. She twice underwent hypnosis, and after these sessions remembered for the first time that her gun was defective and had misfired. She had never related these details until after she was hypnotized. The trial court had ruled that the defendant could testify only to facts remembered prior to hypnosis, and that the hypnotically refreshed testimony would not be allowed. The Arkansas appellate courts affirmed. This Court reversed. The Court said that "like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the common-law rule [prohibiting a defendant from testifying] can be tested adequately by cross-examination." *Rock v Arkansas*, *supra*, 483 US at 52. The Court further stated that "certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-

examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instruction." *Rock v Arkansas*, *supra*, 483 US at 61.

Rock v Arkansas was based primarily upon a defendant's right to present a defense, and did not involve a Confrontation Clause issue. Nonetheless, the observations in *Rock* are helpful to a determination of whether this Court should grant this petition. The Michigan Supreme Court has created an anomaly: equally proper evidence is admissible when offered by the defense but inadmissible when offered by the prosecution. Whether the Michigan Supreme Court can create such a rule by application of its own rules is not the issue here: the Michigan Supreme Court did not purport to do so. Instead, the Michigan Supreme Court applied its prior precedents, holding that hypnosis can impair a defendant's right to confrontation, and held that the evidence of hypnotized witnesses in this case was improperly admitted into evidence. This determination is difficult to reconcile with the logic of *Rock*. More importantly, it is impossible to reconcile with the holdings of *United States v Owens* and *Delaware v Fensterer*.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court should grant plenary review, reverse the Michigan Supreme Court, hold that the presentation of the testimony of witnesses who had been hypnotized did not deprive the defendant of his right to confrontation under the Sixth Amendment and Fourteenth Amendments of the United States Constitution, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

WILLIAM A. FORSYTH (P 23770)
Kent County Prosecuting Attorney
Of Counsel

TIMOTHY K. McMORROW (P 25386)
Chief Appellate Attorney
Counsel of Record

416 Hall of Justice
333 Monroe Ave NE
Grand Rapids, MI 49503
(616) 774-3577

Michigan Supreme Court
Lansing, Michigan 48909

SYLLABUS

This syllabus was prepared by Reporter of Decisions
the Reporter of Decisions. William F. Haggerty

Chief Justice	Associate Justices	
Dorothy Comstock	Charles L. Levin	Patricia J. Boyle
Riley	James H. Brickley	Dennis W. Archer
	Michael F. Cavanagh	Robert P. Griffin

PEOPLE V. LEE

Docket No. 78005. Argued October 6, 1988 (Calender No. 11). Decided January 10, 1990.

Albert Lee, III, was convicted by a jury in the Kent Circuit Court, George V. Boucher, J., of first-degree felony murder. The Court of Appeals, MacKenzie, P.J., and C. W. Simon, J. (Maher, J., dissenting), affirmed in an unpublished opinion per curiam, finding that because the case was decided before *People v. Gonzales*, 415 Mich 615 (1982), its standards concerning admissibility of hypnotically induced testimony were not applicable, and that because the identification procedures used were not unnecessarily suggestive or conducive to irreparable misidentification, admission of the testimony of hypnotized witnesses was proper. The Court further held that admission of similar acts testimony to show identity was not error (Docket No. 5104). Following decision in *People v. Nixon*, 421 Mich 79 (1984), the case was remanded to the Court of Appeals, and, on remand, the Court of Appeals, MacKenzie, P.J., and Maher and Beasley, JJ., affirmed in an unpublished opinion per curiam (Docket No. 85840). The defendant appeals.

I. In an opinion by Justice Brickley, joined by Justice Levin, and an opinion by Justice Cavanagh, joined by Justice Archer, the Supreme Court *held*:

The testimony of a hypnotized witness is inadmissible absent proof by clear and convincing evidence that the testimony being offered was based on facts recalled and related prior to hypnosis.

1. Under the Rules of Evidence, all relevant evidence is admissible, absent prejudice, confusion, or waste of time, and all witnesses are presumed competent to testify. The relevancy of eyewitness identification is not questioned. While hypnotically induced testimony is inadmissible, a witness may testify regarding facts demonstrably recalled prior to hypnosis. The burden is on the party offering the testimony of a hypnotized witness to establish its reliability by clear and convincing evidence.

2. The process of hypnosis is not a reliable means of accurately restoring forgotten incidents or repressed memory. In *Gonzalez*, the Court stated that posthypnotic testimony was inherently unreliable. Under the doctrine of *People v. Davis*, 343 Mich 348 (1955), and *Frye v. United States*, 54 App. DC (1923), results of new scientific principles should be admitted only when the technique has gained general acceptance with the recognized field. Because the science of hypnosis itself cannot aid in distinguishing the effect on memory in specific cases, all posthypnotic testimony that is not recalled and related prior to hypnosis should continue to be considered unreliable. Until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger

of distortion, delusion, or fantasy, the testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases. Because this case was pending on appeal when *Gonzales* was released and the hypnosis issue was properly preserved, the defendant is entitled to its application. Under the standards adopted in *Gonzales* and *Nixon*, testimony of a hypnotized witness is inadmissible, absent proof by clear and convincing evidence that the testimony being offered was based on facts recalled and related prior to hypnosis.

3. Where a reviewing court finds that evidence was improperly admitted, it must also make a determination regarding whether the error was harmless. In this case, the error was prejudicial to the defendant. Absent the testimony of the hypnotized witnesses, the remaining evidence did not positively link the defendant to this crime. Although the physical evidence was not overwhelming, even though circumstantially significant, it had limited probative value, absent the eyewitness identification of the defendant, and it cannot be concluded that all reasonable doubts would have been eliminated in the jurors' minds.

II. In an opinion by Justice Boyle, joined by Chief Justice Riley and Justice Griffin, concurring only in the result reached by Justice Brickley, joined by Justice Levin, the Supreme Court further *held*:

The similar acts evidence offered by the prosecution was admissible.

Reversed and remanded for a new trial.

Justice Brickley, joined by Justice Levin, further would hold:

1. Introduction of similar acts evidence is an exception to the general rule that evidence of other crimes is inadmissible. In order to be admissible, the prosecution must show a high degree of similarity between the charged and uncharged acts. The policy considerations underlying the safeguards are to avoid convicting the defendant because of prior misconduct rather than on the proofs of the charged offense. Before such evidence may be admitted, there must be substantial evidence that the defendant actually perpetrated the bad acts sought to be introduced; there must be some special quality or circumstance of the bad act tending to prove the defendant's identity; the factors must be material to the determination of the defendant's guilt of the charged offense; and the probative value of the evidence sought to be introduced must not be outweighed-substantially by the danger of unfair prejudice. To test whether there is a special quality or circumstance sufficient to justify admission of the evidence on the issue of identity, it is the uniqueness and distinctiveness with which both crimes were committed, combined with the proof that the defendant committed the like act, that is the key.

2. In this case, the similarities between the two incidents are that both involved a black man driving a black car, each occurred in the early morning hours when children would be walking to school, both involved young girls, and both occurred in the same general area. The manner and circumstances of the stalking and the attracting of the victims can be and is sufficiently distinctive and unique that it can pass the "signature" requirement of *People v. Golochowicz*. On this record, in and of itself,

the similar acts evidence is more probative than prejudicial. While the prosecutor's use of the evidence was inappropriate, on the basis of the record it was admissible.

Justice Cavanagh, joined by Justice Archer, dissenting in part, stated it was an abuse of discretion for the trial court to admit the testimony of the similar acts witnesses. The similar acts testimony did not show that the defendant was either stalking or attracting the two young girls into his car or that he was engaged in any improper or criminal conduct that can be described as highly similar to the conduct involved in the abduction of the victim in the instant offense. The similar acts are not so unusual and distinctive as to serve the purposes for which such evidence may be considered by the jury.

Justice Boyle, joined by Chief Justice Riley, and Justice Griffin, dissenting in part, would hold that *Frye v United States*, 54 App DC 46; 293 F 1013 (1923), should not be applied to exclude the testimony of a witness simply because the witness has been hypnotized. Rather, the dangers of hypnosis require that the reliability of such testimony be established by clear and convincing evidence.

1. Where posthypnosis identification is otherwise shown to be reliable, there is no purpose in limiting identification evidence to facts related and recalled prior to hypnosis. In the context of posthypnosis identification particularly, the rule espoused by the majority sweeps too broadly, eliminating reliable and unreliable evidence alike. The more prudent balance should be struck by requiring a preliminary determination of admissibility case by case. The court should, pursuant to MRE 104,

make a determination of the reliability of the evidence sought to be presented. If posthypnosis testimony is found sufficiently reliable for admission, the parties should remain free to make the jury aware of the dangers of hypnosis with expert testimony and to cross-examine the identifying witness with regard to the conditions of hypnosis and any independent basis for observation.

2. So analyzed, there is clear and convincing evidence of the reliability of the testimony in this case of all the hypnotized witnesses save one. While the trial court erred in admitting this testimony, it cannot be said that the error resulted in a miscarriage of justice. The record indicates that the identity of the defendant was unknown to the police officers at the time of the initial hypnosis, and, thus, it is indisputable that there was no connection between that hypnosis and the witnesses' later identification of the defendant. Additionally, the identification of the vehicle was reliable, as the defendant's expert witness testified, because it was identified by the witnesses before, during, and after hypnosis, and, thus, the hypnosis had no bearing on its identification. The defendant's ownership of the vehicle was corroborative of the reliability of the identification of the defendant. Finally, and most significantly, the defendant's expert testified that the identification of the defendant was not the product of the hypnotic sessions.

-The defendant's conviction should be affirmed.

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Michigan Supreme Court
Lansing, Michigan 48909

OPINION

Chief Justice
Dorothy Comstock Riley

Associate Justices
Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT LEE III,

Defendant-Appellant.

No. 78005
(Filed Jan. 10, 1990)

BEFORE THE ENTIRE BENCH

BRICKLEY, J.

Defendant, Albert Lee, III, was convicted of first-degree felony murder¹ and sentenced to life imprisonment. We granted leave to appeal limited to:

(1) Whether the testimony of witnesses who had been hypnotized was properly admitted; and

(2) Whether similar acts evidence was properly admitted.

¹ MCL 750.316; MSA 28.548; kidnapping being the underlying felony.

We hold first that the rules of *People v. Gonzales*² and *People v. Nixon*³ were violated and thus that it was error for the trial court to admit the identification testimony of the hypnotized witnesses. Second, the similarities between the charged crime and the similar acts testimony satisfies the standards of *People v. Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982).

I

Procedurally this case has a long history. Following his conviction, defendant moved for a new trial which was denied. Defendant appealed by right. The Court of Appeals held that the standards of *People v. Gonzales*, *supra*, dealing with hypnotized witnesses were not satisfied.⁴ However, the Court of Appeals held that because this case was decided before *Gonzales* its holding was inapplicable "but that reversal is nevertheless required in a pre-*Gonzales* case if defendant was prejudiced by admission of testimony as to recollections induced by hypnosis." Thereafter the Court found that the identification procedures were not "unnecessarily suggestive or conducive to irreparable misidentification," upholding the trial court's admission of the testimony of hypnotized witnesses.

² 415 Mich 615; 329 NW2d 743 (1982), modified 417 Mich 986; 336 NW2d 751 (1983).

³ 421 Mich 79; 364 NW2d 593 (1984).

⁴ *People v. Lee*, unpublished opinion per curiam of the Court of Appeals, decided May 9, 1983 (Docket No. 51044).

Judge Maher dissented on the hypnosis issue. He concluded that on the basis of the factors pronounced by this Court in *People v. Hampton*, 384 Mich 669; 187 NW2d 404 (1971), *People v. Gonzales*, *supra*, should be applied retroactively.⁵ Thus, he found that defendant was denied a fair trial because the eyewitness testimony was tainted by hypnosis.

Relative to the similar acts testimony, the Court of Appeals found that the facts were sufficiently substantial to justify admission to show identity. The Court held that the trial court did not abuse its discretion and that the evidence was not erroneously admitted.

A request for review was filed with this Court and it was held in abeyance pending release of another hypnosis case, *People v. Nixon*, 421 Mich. 79; 364 NW2d 593 (1984). Following the release of *Nixon*, the case was remanded to the Court of Appeals for reconsideration. On remand, the case was reaffirmed.⁶ We granted leave to appeal. 429 Mich 885 (1987).

II

The undisputed facts of this case are that an eleven-year-old Grand Rapids girl was abducted from her school safety patrol post on the morning of February 12, 1979.

⁵ The law on hypnosis has been changed considerably since then and the basis on which Judge Maher dissented is no longer applicable.

⁶ *People v. Lee (On Remand)*, unpublished opinion per curiam of the Court of Appeals, decided November 21, 1985 (Docket No. 85840).

Later that same day her body was found near the Regency Park Apartments. The cause of death was strangulation.

The extensive investigation by police produced four categories of evidence: (1) eyewitness identifications, (2) physical evidence, (3) similar acts evidence, and (4) testimony of defendant's former cellmate which is not at issue in this appeal. The propriety of the similar acts evidence is discussed below. We therefore turn to a discussion of the eyewitness identification and the physical evidence.

A

There were seven key prosecution witnesses (Jack Hill, James Vos, Jack Vos, Greg Start, David Orr, Jr., Timothy Wilcome and Jim Bonnema), all of whom were hypnotized. Moreover, five of the witnesses were hypnotized on two separate occasions by different hypnotists. The first hypnotic session was conducted by Mr. Robert Mazur, a local hypnotist, who operates the Grand Rapids Hypnotic Clinic. Mr. Mazur is not a psychiatrist or a psychologist and did not testify at trial. Dr. Donald Rossi of the Michigan Department of State Police conducted the second hypnotic session. Most of the hypnotic sessions were audio-taped but not videotaped. According to the experts who listened to the tapes, the hypnosis sessions themselves were conducted without any deliberate "attempt to alter [witnesses] memories."

Police were notified of the incident by Jack Hill who witnessed the last stages of the abduction. At the intersection of the abduction, Jack Hill noticed a car parked on

the wrong side of the road and stopped to offer assistance. He spoke to a black man standing outside the vehicle and noticed a young white girl in the back seat. As the black man drove off Mr. Hill attempted to follow the car. Mr. Hill described the car as a clean, shiny black two door. He originally told the police that he thought the car might be a Chrysler; however, at trial he testified that the car was a black Grand Prix. The driver was described as a neatly dressed black man with a neat haircut. Mr. Hill did not notice any facial hair on the man.⁷

James Vos was driving his son, Jack Vos, to school at the time of abduction when he noticed a black car skidding fast around a corner towards his vehicle. Mr. Vos was stopped for traffic when Mr. Hill informed them that he needed assistance pursuing a vehicle because a young girl had been abducted. James Vos described the car as a clean black two-door hardtop Pontiac Grand Prix with fancy wheel hubs and white walls. Mr. Vos noticed a black man driving the car who was approximately twenty-five to thirty years old, clean in appearance, wearing a dark leather jacket, and having an afro haircut moderate in length. However, he was unable to clearly identify the man driving the car. He did not notice anyone in the car and, in fact, stated that his main concentration was on the

⁷ A police officer testified that he stopped the defendant on February 12, 1979, and described defendant as having a mustache and noticeable sideburns. The defense attempted to emphasize at trial that none of the eyewitnesses remembered the perpetrator as having facial hair or sideburns thus suggesting that defendant could not have been the abductor. Additionally, the girls who testified about the similar act do not recall the man having a mustache or sideburns.

car and not on the person driving the car. At trial he was confident about his testimony concerning the make and model of the car.

Like his father, Jack Vos observed the car as being a Grand Prix because of the insignia and the grill on the vehicle. He was confident about the description of the car. However, unlike his father, he did observe a small girl in the back seat. He testified that she was a white girl, with blond hair, wearing a blue hat and a green coat.

On the day of the incident, February 12, 1979, Jack Hill was taken to the police department where two composite drawings were made. The first composite drawing was made prior to Mr. Hill being hypnotized. A second composite was compiled during the hypnotic session with Mr. Mazur. Jack Hill, James Vos, and Jack Vos were also all hypnotized on February 12 by Mr. Mazur.

Greg Start, a school crossing guard, gave testimony that he had seen a black car with red pinstriping and a red interior drive by his patrol corner twice. He noticed the car a second time because the driver had run a stop sign. Greg's testimony was more specific in that he identified the car as a Grand Prix because he saw the letters on the front fender of the car. Further, he described the driver as a young black man with a mustache and an afro hairstyle.

The victim's knapsack was recovered from a dumpster at the Georgetown Condominiums by the rubbish collector sometime on the afternoon of February 12, 1979. The Georgetown Condominiums are located within one mile of where the victim's body was found. On the morning of February 12, a black car driven by a black man was

lodged in a snowbank at the condominium. Two grounds maintenance men, David Orr, Jr., and Timothy Wilcome testified that they helped the man free his vehicle. Specifically, Mr. Wilcome testified that a black man with neat hair (not an afro style), wearing a leather jacket walked up to the shed and asked for assistance to push his car out of a snowbank. Wilcome stated further that the black man smoked Kool cigarettes⁸ and that the car looked like a black Monte Carlo.⁹ Mr. Orr stated specifically that the car was a black Monte Carlo because of the emblem on the back of the car.¹⁰ Also that the car had bicentennial license plates¹¹ and spoke-type wheels with curb feelers. Thereafter, Mr. Orr saw him get out of the car and throw something away in a nearby dumpster. Two days after the incident, February 14, 1979, Timothy Wilcome and David Orr, Jr., were hypnotized.

⁸ A police officer testified that during an investigatory interview with defendant, he smoked Kool cigarettes.

⁹ During the investigation stage of this case, Mr. Wilcome told defendant's attorney that the vehicle he saw on the morning of February 12 could not have been a Pontiac Grand Prix.

¹⁰ To free the car from the snow he had to attach a tow rope to the back of the vehicle.

¹¹ Defendant apparently got new license plates sometime during business hours on February 12, 1979. Testimony suggests that it was sometime before noon. However, we would note that this was not a spontaneous attempt on the part of defendant to "cover his tracks." In the week proceeding the slaying, defendant had attempted to transfer title on the vehicle and obtain new license plates but was unable to complete the transaction.

As the police continued to receive tips on the abductor, three mugbooks were compiled. Defendant's picture appeared in mugbooks one and two, however he was not pictured in the third mugbook. The first photo showing (mugbook one) occurred on February 15, 1979. Jack Hill, David Orr, Jr., James Vos, Jack Vos, and Timothy Wilcome participated, but no positive identification was made. In fact, each witness identified persons other than defendant as possessing features similar to the abductor.

Mr. Jim Bonnema notified the police about seeing the particular vehicle on the morning of February 12 after reading about the incident in the newspaper and seeing a story on television. He was hypnotized on February 16, 1979,¹² and while under hypnosis he gave a license plate number. However, he was unable to positively identify the driver of the vehicle.

On February 23, 1979, Jack Hill, Jack Vos, David Orr, Jr., and Timothy Wilcome were hypnotized for the second time by Dr. Donald Rossi. During the hypnotic session with Mr. Hill, a police artist was present who attempted to sketch a third composite drawing while Mr. Hill was under hypnosis. Following the hypnotic sessions each witness participated in a second photo showing (mugbook two). Mr. Orr identified defendant, among others, from this mugbook. Otherwise there was no positive identification by any other witness.

¹² The tape of Mr. Bonnema's hypnotic session was not available to defendant. It was apparently lost or erased during the investigation. However, defendant did receive a copy of the synopsis made after the session.

On February 26, 1979, defendant went to the police department for a polygraph examination,¹³ at which time he agreed to participate in a corporal lineup. The participating witnesses were Jack Hill, Jack Vos, James Vos, David Orr, Jr., and Timothy Wilcome. Of these witnesses, only Timothy Wilcome picked defendant from the lineup; however, he could not make a positive identification.¹⁴

On March 15, 1979, mugbook three was shown to Hill, Orr, Wilcome, James Vos, and Jack Vos. The witnesses did not positively identify any person (defendant was not pictured). Mr. Wilcome is the only witness who did not pick anyone from these photographs.

Defendant participated in a second lineup on March 29, 1979. At this lineup the defendant was identified by Mr. Hill, Jack Vos, and Mr. Wilcome, Mr. Orr picked someone other than defendant from this lineup as being the alleged perpetrator. James Vos also participated in the lineup, but could not identify the perpetrator.

¹³ Polygraph testing and the results were not introduced at trial. However, according to testimony given during the pre-trial motions, defendant apparently failed the polygraph testing.

¹⁴ Eight men participated in the lineup. All the men had their hair in cornrows, and thus defendant fixed his hair in a similar fashion. However, on the day of the incident, the perpetrator was described as having a neat, small to medium afro. As a result the participating witnesses claimed that identification was impossible because defendant was disguised.

Two months later, on June 19, 1979, Greg Start was hypnotized by Dr. Rossi.¹⁵ The next day he participated in a corporal lineup and picked defendant.¹⁶

Prior to the second lineup, March 29, 1979, one day prior to defendant's arrest, most witnesses at one time or another had made false identifications or at least identifications of persons other than defendant. Mr. Wilcome was the only witness who picked defendant from both lineups. However, he did not make a positive identification at either.

All of the in-court identifications of defendant, except by Jack Hill, were tentative. Mr. Hill made two in-court identifications of the defendant, the first being at the preliminary examination and the second during trial. He was extremely confident about each in-court identification.

¹⁵ Greg Start is one of the few witnesses who admits at trial that he does think he was hypnotized. The audio tape of his hypnotic session with Dr. Rossi was played to the jury; however, it was not transcribed in the record. At trial, defendant's attorney cross-examined Greg Start as to various statements he made to Dr. Rossi during the hypnotic session. Relevant to the issue of identification, Grey Start made the following statements: "No, I didn't get a good look at him either time"; in response to Dr. Rossi's question "Did you see his face a little bit?" He answered, "A little bit"; in response to a question concerning whether or not Greg saw the car, he answered "Not too good, not at all"; he also stated, "I didn't pay much attention to him."

¹⁶ This occurred after the arrest of defendant (March 30, 1979) and after pictures of the defendant appeared in the newspapers and on television.

At trial, Jack Vos made an in-court identification of the defendant as the man he picked from the second lineup. However, he testified that, while defendant looked identical to the man, he could not identify defendant as the man he saw on February 12. Greg Start positively identified defendant as the man he picked from the lineup on June 20. However, this identification occurred after considerable publicity attendant to defendant's arrest,¹⁷ and at trial he stated that he expected to see the suspect in the lineup.

Timothy Wilcome made an in-court identification of defendant as the person he selected from both lineups. At trial he testified that he was not confident in his identification of defendant but that he looked the closest to the person he saw on February 12. At the time of trial James Vos did not make an in-court identification. Rather, he testified that he could not state, one way or the other, whether defendant was the person driving the vehicle on the morning of February 12. Jim Bonnema was unable to

¹⁷ Defendant filed two motions relative to the publicity surrounding the incident. First, defendant sought to have the proceedings closed on the basis of a balancing of the substantial amount of publicity and defendant's ability to obtain a fair trial. The trial court denied defendant's motion. The Court found that the First Amendment rights of the press were a substantial interest in this case and that defendant could still receive a fair trial with an open courtroom. Second, defendant moved for a change of venue, consideration of which was reserved until the jury was selected. Defendant raised two grounds for his motion, (1) damaging media coverage, and (2) the emotional effect of the crime on potential jurors and the community. The court denied the motion, stating that an impartial jury had been empaneled.

positively identify the defendant at trial. However, he did state that there was nothing unusual about defendant to rule him out as the driver of the Grand Prix.

B

Our analysis on the issue of admissibility begins with two basic premises offered by the prosecution from the Rules of Evidence. First, all relevant evidence is admissible, absent prejudice, confusion, or waste of time. MRE 401, 402, 403. Second, all witnesses are presumed competent to testify. MRE 601, 602. The relevancy of an eyewitness identification is not questioned. Therefore our only concern is the admissibility of a witness' testimony after being subjected to hypnosis.

The test to be applied is derived from our holdings in *People v. Gonzales*, and *People v. Nixon, supra*.¹⁸ In *Gonzales*, we held that hypnotically induced testimony is inadmissible, but left open the question whether a hypnotized witness could testify regarding facts recalled and related prior to hypnosis. We answered the question in *People v. Nixon*, holding that a witness may testify regarding facts " 'demonstrably recalled prior to hypnosis.' "

¹⁸ In *People v. Nixon*, we rejected the defendant's arguments that a witness was totally incompetent because of being placed under hypnosis relying on the holding of the Arizona Supreme Court in *State ex rel Collins v. Superior Court*, 132 Ariz 180; 644 P2d 1266 (1982), and the New York decision of *People v. Hughes*, 59 NY2d 523; 453 NE2d 484 (1983). For a summary of the development of the law on hypnosis in other jurisdictions, see *People v. Gonzales* and *People v. Nixon*.

The burden is on the party offering the testimony of a hypnotized witness to "establish its reliability by clear and convincing evidence." *Nixon, supra* at 90. The clear and convincing standard adopted in *Nixon* does not, as the dissent would suggest, extend to the question whether any posthypnotic testimony is reliable.¹⁹ Rather, testimony of a hypnotized witness is reliable only when the clear and convincing evidence offered by the proponent of the testimony demonstrates that the witness is testifying only with regard to those facts which were recalled and related prior to hypnosis.

Further, in *Nixon* we reaffirmed our position, quoting with approval the following language from *Gonzales*:

"The process of hypnosis is not a reliable means of accurately *restoring forgotten incidents or repressed memory*, and to permit posthypnotic testimony would unfairly denigrate the defendant's right to cross-examination. Therefore, we hold that until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses *which has been tainted by hypnosis* must be excluded in criminal cases." [*People v. Nixon, supra* at 88, quoting *People v. Gonzales, supra* at 626-627 (emphasis in original).]

¹⁹ The dissent justified our holding in *Nixon* concerning the admissibility of posthypnotic testimony by labeling it as a "heightened reliability standard" which would require "that reliability must be shown by clear and convincing evidence." (Slip op, p 6, Boyle, J., dissenting.)

The dissent advances that this Court erred in *Nixon* by applying the *Davis/Frye* test to hypnosis.²⁰ However, hypnosis is a scientific procedure which renders a subject susceptible to external influences which could distort the memory.²¹ "[S]cientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy."²² "[N]o expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation. . . . Such results are not scientifically reliable as accurate."²³ Accordingly, we can find no justifiable reason for overturning clear precedent established in this state.²⁴

²⁰ We note that the parties in this case did not raise or argue on appeal the applicability of the *Davis/Frye* doctrine to the hypnotic process. *People v. Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v. United States*, 54 App DC 46; 293 F 1013 (1923).

²¹ See, generally, Scholder, *The argument against use of hypnosis to improve or enhance the memory of courtroom witnesses*, 7 Law & Psychology R 71 (1982); Curato, Plifka & Schroeder, *Recent decision: Evidence: Hypnotically enhanced testimony - A question of admissibility of credibility for criminal courts?* 58 Notre Dame L R 101 (1982); comment, *Hypnosis - should the courts snap out of it? - A closer look at the critical issues*, 44 Ohio State L J 1053 (1983).

²² *Rock v. Arkansas*, 483 US 44, 61; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

²³ *State v Mack*, 292 NW2d 764, 768 (Minn, 1980).

²⁴ Defendant's expert, Dr. Martin T. Orne, whose testimony the dissent relied upon in its finding of reliability and admissibility of posthypnotic testimony stated that hypnosis, although a valid investigatory tool, should not be used as a means by which to get an accurate eyewitness account of an event for testimonial purposes. He cautions against such use

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Defendant argues that the procedures established by this Court in *People v. Nixon*, were not followed, so corrupting the identification process by the suggestive effect of hypnosis as to deny defendant his right to a fair trial. The prosecutor admits that the hypnotic sessions were not conducted in light of the safeguard procedures adopted by the Court in *People v. Nixon*.²⁵ However, the prosecutor asserts that under a totality of the circumstances, the testimony of each eyewitness was not tainted by hypnosis and, in fact, was based on prehypnotic recollection. We disagree that such an approach is allowable under the precedent of *Gonzales* and *Nixon*.

The investigation in this case took place before *Gonzales* was decided. In *Nixon*, we ruled with regard to the application of *Gonzales*, holding that the principles set forth therein are not to be applied retroactively but are

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because it is virtually impossible to separate an actual memory from that created while in a hypnotic state. Dr. Orne is a renowned expert in the area of hypnosis and hypnotically refreshed memory.

²⁵ We note that the safeguards announced by Dr. Orne and adopted by the dissent in formulating a new test were not adhered to in this case. (See Slip op, p 10, Boyle, J., dissenting). First, the initial hypnotic sessions of six of the seven hypnotized witnesses were conducted by Mr. Robert Mazur, a local hypnotist. Mr. Mazur is not a psychiatrist or psychologist. Second, Dr. Donald Rossi, who conducted the second hypnotic sessions, although a psychologist, is not independent of the state. Third, neither hypnotist extracted from the subjects a prehypnosis description of the events. Fourth, all contacts between the hypnotist and the subject were not preserved for review by a recording. Finally outside third parties were present during the hypnotic sessions.

applicable to all cases tried after its release and to those pending on appeal where the hypnosis issue is preserved. Defendant's case was pending on appeal when *Gonzales* was released, and the hypnosis issue was properly preserved. Thus defendant is entitled to application of *Gonzales*.

Although the rules enumerated in *Gonzales* and *Nixon* are applicable, factually the two cases differ from this case because neither involved a posthypnotic lineup identification. The only case we have dealt with involving posthypnotic lineup identification was *People v Centers*, 422 Mich 951; 376 NW2d 653 (1986). We addressed the issue of admissibility of a witness' testimony after submitting to hypnosis to resolve a conflict in the Court of Appeals. See *People v Centers*, 141 Mich App 364; 367 NW2d 397 (1985), and *People v McIntosh*, 142 Mich App 314; 370 NW2d 337 (1985).²⁶

²⁶ In a footnote, the *McIntosh* panel recognized that a conflict existed between its holding and the holding in *People v Centers*,

We recognize that the panel in *People v Centers*, *supra*, concluded that admission of evidence in Faulkner's identification of suspects at the posthypnotic lineup was reversible error because the actual *identification* was not something recalled and related prior to hypnosis. We are unable to agree with this conclusion because we understand *Nixon* to permit trial testimony which is based on facts recalled and related prior to hypnosis even if the statement (including identification) was obtained after hypnosis. We base this analysis on the *Nixon* Court's statement in footnote 3 that "[s]tatements obtained *after* hypnosis are inadmissible per se under *Gonzales*, except as -

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Centers and McIntosh were tried together, and both were convicted of murder and armed robbery. Following an evidentiary hearing, the trial court allowed testimony concerning the identification of the suspect made at a posthypnotic lineup. The lineup occurred eight months after the hypnotic session. Prior to hypnosis, the witness gave police a description of the suspect on two occasions. During the hypnotic session, the witness gave basically an identical description of the suspect. The hypnotic session was tape recorded and transcribed, as well as reviewed by the court during the evidentiary hearing.²⁷ The trial court reached its decision to allow the testimony by

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otherwise stated in this opinion and in accordance with applicable evidentiary rules." 421 Mich 91. In this case, we find, as did the trial court, that Faulkner's tentative identification of defendant at the posthypnotic lineup was based solely on facts recalled and related by her prior to hypnosis. Her in-court testimony about this identification was, therefore, solely based on facts recalled and related prior to hypnosis. [142 Mich App 321-322, n 5 (emphasis in original).]

²⁷ In a footnote, the *Nixon* Court ruled as to the admissibility of tape recordings of the hypnotic sessions. The Court stated:

The trial court correctly ruled that statements made during hypnosis are inadmissible to prove the truth of the matters asserted therein Given the inherent problems of investigative hypnosis, we also hold that statements obtained from a witness during hypnosis cannot be used to bolster or impeach the witness' credibility. [*Nixon, supra* at 91, n 3 (citations omitted).]

comparing the descriptions made by the witness pre- and posthypnosis. On appeal, both defendants argued that the trial court erred in admitting testimony of an eyewitness who had been hypnotized during the police investigation.

The Court of Appeals in *Centers* ruled that identification of a suspect at a corporal lineup by a witness who had been hypnotized was error requiring reversal. The Court found significant the fact that identity was central to the issue at trial, so that the testimony of the witness regarding identification of the defendant was not harmless error. The Court remanded the case to the circuit court holding that

the circuit court shall not admit any posthypnotic testimony or testimony concerning posthypnotic statements unless it is demonstrated that the testimony is based solely on facts recalled and related by the witness or declarant prior to hypnosis and the party offering the testimony establishes its reliability by clear and convincing evidence. [*Centers, supra* at 371.]

Contrary to the holding in *Centers*, the *McIntosh* panel found that because of the similarity in the witness' descriptions of the suspect, both pre- and posthypnosis, the identification at the lineup was based on facts recalled and related prior to the hypnotic session.

In lieu of granting leave to appeal, we vacated the decision in *People v Centers* and affirmed the decision of *People v McIntosh*, 422 Mich 951 (1986). Justice Levin dissented, stating that the prosecutor had failed to establish by clear and convincing evidence that the witness was recalling facts related prior to the hypnotic session.

In *McIntosh* and *Centers*, testimony from the eyewitness was admitted on the basis of a comparative analysis of the information given during hypnosis and the prehypnotic statements. Because the information was substantially the same, the Court found that the identification was based on information recalled and related prior to hypnosis. However, in this case, we cannot make such an analysis. We do not have prehypnotic statements from the witnesses, nor an identification of the defendant prior to the hypnotic sessions.

It is obvious in this case that the police department was in a most difficult investigative posture, knowing as they did that an eleven-year-old girl had been abducted and that she, and possibly other potential victims, were in serious jeopardy. Thus, they devoted their efforts to extract every conceivable bit of information from the witnesses as quickly, and as thoroughly, as possible. The dissent suggests that under the rule adopted in Michigan the state must "choose between use of hypnosis during the investigative stage and the potential loss of a witness' testimony at trial" (Slip op, p 6, Boyle, J., dissenting.) However, the use of hypnosis as an investigatory tool is not foreclosed by today's decision. The error in this case resulted from the fact that the investigation was conducted with little or no thought to the preservation of evidence for testimonial purposes. It is admitted that there was virtually no attempt to establish a record of the prehypnotic state of mind of each witness.

Three witnesses were hypnotized on the day of the abduction, and three other witnesses were hypnotized two days after the incident. Furthermore, five of the seven key prosecution witnesses were hypnotized twice.

This further complicates and accentuates the inherent difficulties that are present in even a single hypnotism of a witness and that have already led us to exclude hypnotically induced testimony. The administration of hypnosis to the witnesses was interspersed among the photographic and corporal lineups, making it nearly impossible to track the purported state of each witness' memory, even if such evidence were available.

The prosecution argues and the defense experts agree that the hypnotic sessions were conducted without any deliberate attempt to alter witnesses' memories. However, even if, as proposed by the dissent, nonsuggestiveness eliminates the unreliability of posthypnotic testimony, the fact that the police originally did not have a suspect toward whom the interrogator could possibly nudge an uncertain witness, there undoubtedly was in this case, and understandably so, a strong desire to have an identification made.²⁸ While the dissent suggests we

²⁸ The hypnotic state is a condition of altered consciousness marked by heightened suggestibility. A subject in a [sic] hypnotic state may not have accurate recall. A hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended. Such suggestion may be transmitted either during the hypnotic session or before it The person under hypnosis experiences a compelling desire to please either the hypnotist or others who have asked the person hypnotized to remember or who have urged that it is important that he or she remember certain events. The subject may produce the particular responses he believes are expected of him. In this state of hypersuggestibility and hypercompliance the subject will unconsciously create answers to the questions which the hypnotist asks if he cannot recount the details being sought. This process of filling the gaps of memory with fantasy

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"ignored" the lack of a suspect at the time of the "initial" hypnosis, the dissent ignores the fact that Mr. Wilcome was the only witness to identify defendant from the first lineup. The identification of defendant by Mr. Wilcome during the first lineup was not positive. Mr. Wilcome initially did not identify any individual, but rather as an afterthought picked the defendant as the man who looked the closest to the perpetrator. Further, defendant was a primary suspect²⁹ at the time of the second hypnosis which occurred one month prior to the identification of the defendant at the second lineup. The second hypnotic session took place after police had an opportunity to verify defendant's alibi statement which resulted in discrepancies in times and places.

The prosecutor further argues that because there was a uniformity of reactions by all the witnesses at the lineups, the identifications were based on prehypnotic

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is called confabulation. Neither the person hypnotized nor the expert observer can distinguish between confabulation and accurate recall in any particular instance. [*Gonzales, supra*, pp 623-624.]

²⁹ The Grand Rapids Police Department received two tips concerning defendant. Defendant was first contacted by police on February 16, 1979. Defendant was again contacted one week later to clarify discrepancies in the statements he gave to police concerning his whereabouts on the day of the incident. This is the same day that the second hypnotic sessions were conducted. It was at this time that arrangements were made for polygraph testing. Only six to eight other individual suspects were contacted on more than one occasion by police and only one other suspect took a polygraph exam. Defendant was the focus of the police investigation on February 23, 1979.

memory. We disagree; first, because even though each witness gave a general description of a black man prior to hypnosis, it was not until after the hypnotic sessions that the witnesses were given the opportunity to select or reject the defendant. Furthermore, each witness at one time or another identified persons other than defendant as the perpetrator. Lastly, there is no record of the pre-hypnotic descriptions of the perpetrator available upon which to make a comparison, as we did in *Centers* and *McIntosh*, to support the admission of identification testimony by the hypnotized witnesses.

Further, the plaintiff did not argue, nor can we conclude, that the prehypnosis composite drawing by witness Jack Hill can be considered a statement recalled and related under *Nixon*. The composite drawing represents the work of the artist and cannot substitute for oral testimony related and recorded.

The dissent also claims that the uniformity among witnesses of the identification of the vehicle driven by the abductor supports the conclusion that the identification was reliable. The record, however, paints a fuller picture. Jack Hill, the man who witnessed the last stages of the abduction, initially and while under hypnosis identified the vehicle as a shiny, black Chrysler³⁰ Subsequent to

³⁰ On cross-examination Mr. Hill gave the following testimony:

Q. As you approached the car, did you see the front of the car, the grill, any name brand markings?

A. No, sir.

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both hypnotic sessions Mr. Hill saw defendant's vehicle in the police garage and thereafter testified at trial that

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Q. In fact, Mr. Hill, wasn't it your belief on February 12 that the car was a Chrysler?

A. I - I assume I thought it was. I wasn't sure.

Q. Do you remember telling Mr. Mazur on February 12 that it was a shiny, black Chrysler?

A. Yes.

Q. Do you remember telling Mr. Mazur on February 12, the night of this incident, "I'm damn sure it was a Chrysler"?

A. I assumed it was, yes.

Q. Do you remember telling the police, the first statement on February 15, that it was a black Chrysler?

A. I thought it was.

Q. My question is: Do you remember telling them that?

A. Yes.

Q. Do you remember telling them, also, that it was black and you were sure it was a Chrysler?

A. Yes, sir.

Q. Do you remember telling Dr. Rossi on February 23 that you remember seeing on the chrome on the top of the grill, "I'm sure it said Chrysler there. Letters staggered. I didn't see all of Chrysler - Chrysler, but spelled something similar to Chrysler."

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the vehicle was not a Chrysler.³¹ Further, David Orr and Timothy Wilcome, the grounds maintenance men who freed a black car from a snowbank near where the victim's body was found, both testified that the car was a

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A. I think I did.

Q. But, now, you don't think you did?

A. Yes, I believe I told him that.

Q. What about now?

A. I know it's not.

Q. Why do you know it's not?

A. I just know it wasn't a Chrysler.

Q. You know it is not because Mr. Lee does not have a Chrysler, is that true?

A. No, sir. I just assumed it was. I told them I wasn't positive. It was a black, shiny car.

Q. But you weren't positive . . .

A. That it was a Chrysler, no. Never was.

Q. Your statement "damn sure it was a Chrysler," to you is not being positive?

A. (No response)

Q. Pardon?

A. At times I thought it was a Chrysler. I admit that.

³¹ Memory hardening and confabulation as a result of suggestion from external sources are dangers inherent in the hypnotic process.

black Monte Carlo.³² The dissent states that "Orr did identify the car as a black Monte Carlo" but discounts the inconsistency in its analysis by suggesting that the purpose of Orr's testimony was merely corroborative. The procedures employed in this case were totally lacking in safeguards to ensure the reliability of the testimony being

³² Mr. Wilcome testified:

Q. And the car you saw in your view was a Monte Carlo?

A. Yes.

* * *

Q. Do you remember telling me [defendant's attorney] at that time the car you saw could not have been a Grand Prix?

A. Yes.

Q. Is that your view today?

A. Yes.

Mr. Orr testified:

Q. Now, the car that you helped tow on February 12, did you touch that car with your hands?

A. Yes.

* * *

Q. The car you saw was a Monte Carlo?

A. Yes.

Q. You remember seeing the emblem on the back saying that it was a Monte Carlo?

A. Yes.

offered.³³ The standards and analysis employed by the dissent³⁴ suggest that reliability of posthypnotic memory can be tested on the basis of the other independent evidence offered in the case. However, this Court has never proposed that the proper test for admissibility of evidence should be based on the strength of the case against a defendant. If there is enough independent evidence to prove identity, there would be no need to introduce unreliable evidence of identification. Merely because the other evidence offered in the case corroborates defendant's guilt or innocence does not mean that it confirms the reliability of a hypnotized witness' identification of defendant. To establish the reliability of testimony offered by a hypnotized witness would require an evaluation of evidence that would suggest that the memory produced from hypnosis was actual memory and not merely

³³ We recognize that the standards adopted by this Court in *Gonzales* and *Nixon*, as to the admissibility of testimony from a hypnotized witness, were not available at the time of this investigation. However, the issue had been addressed by the Court of Appeals in *People v Hangsleben*, 86 Mich App 718; 273 NW2d 539 (1978). In *Hangsleben*, the Court did not allow the testimony of a psychiatrist who was willing to testify that defendant claimed innocence while under hypnosis. The Court held that defendant had failed to demonstrate the general theory that hypnotically induced memory had achieved general scientific acceptance.

³⁴ The dissent finds "preferable" and has incorporated into its rule the safeguards of the "reliability centered approach . . . articulated in *State v Hurd*, 86 NJ 525; 432 A2d 86 (1981)" (Slip op, p 8, Boyle, J., dissenting.) However, in *Gonzales*, *supra*, pp 624-625, this Court specifically considered and rejected the *Hurd* standards as insufficient to guard against the dangers inherent in the hypnotic process. (See n 24.)

evidence which would further corroborate defendant's guilt or innocence.

The dissent relies on testimony from Dr. Orne to support its conclusion that the testimony received from the hypnotized witness was reliable.³⁵ At trial, Dr. Orne was allowed to comment about the nature of the physical evidence presented and whether, in his opinion, it corroborated the hypnotized witness' testimony. We note first that such an evaluation is beyond the expertise of Dr. Orne and should not have been permitted. Further, the physical evidence served only to circumstantially support defendant's guilt and did not operate to afford a basis for distinguishing between what was the witness' actual memory and what was confabulation.

The dissent has, in our view, mischaracterized the work of this Court in *Gonzalez*. In that case, we unmistakably expressed the view that posthypnotic testimony was "inherently unreliable." *Gonzalez, supra*, p 626. However, we recognize that hypnosis does not always produce unreliable information, and in some cases the technique may have no effect on memory.³⁶ But because the science of hypnosis itself cannot aid us in distinguishing which effect is being achieved in individual cases, we have and should continue to consider as unreliable all posthypnotic testimony that is not recalled and related prior to hypnosis.

³⁵ See n 24.

³⁶ See, generally, *Rock*, n 22 *supra* at 59-61.

The purpose of the *Davis/Frye* doctrine is to determine if the scientific technique as a general rule produces reliable evidence. We cannot agree with the dissent that reliability can be determined in every case. The tenet that the trial judge can make a determination in each individual case and place the stamp of reliability and credibility on a hypnotized witness' testimony is without merit. The dissent today would scrap the *Davis/Frye* decision of *Gonzalez*:

"We agree with the conclusion that the process of hypnosis and its outcome is inherently unreliable. Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced *under even the best of circumstances* will be sufficiently reliable to outweigh the risk of abuse or prejudice" [*Gonzalez, supra* p 626 (emphasis supplied),]

and put the trial courts in the position of determining on an ad hoc basis when hypnotically induced testimony is reliable and, therefore, admissible. This Court has over the years not deviated from application of the *Davis/Frye* doctrine to new scientific discoveries. The best way to achieve reliability of the results of scientific principles is to only allow admissibility of the results when the technique has gained general acceptance within the recognized field.

In a further attempt to recast *Nixon* from a rule that posthypnotic testimony is inherently unreliable into a rule that the trial courts can determine whether or not hypnotically induced testimony is reliable, the dissent states that "[w]hile we did say in *Nixon* that a witness could testify on the basis of facts recalled and related

prior to hypnosis, we did not say that this was the only way" that you could establish its reliability. (Slip op, pp 2-3, Boyle, J., dissenting.) First, the "recalled and related" rule did not make posthypnotic testimony reliable. Rather, because posthypnotic testimony is so unreliable, the rule ensures that a hypnotized witness only testifies with regard to prehypnotic memory if the facts from that prehypnotic memory were recalled and related prior to the hypnosis. If there is any doubt about what we said on that point in *Nixon*, it should be resolved by the very language of the *Nixon* opinion.

In order to insure that the witness' trial testimony is based *solely* on facts recalled and related prior to hypnosis, we hold that the party offering the testimony must establish its reliability by clear and convincing evidence. [*Nixon, supra*, p 90 (emphasis supplied).]

Nixon did not, as the dissent advocates, establish a "heightened reliability standard" for hypnotically affected testimony. (Slip op, p 6, Boyle, J., dissenting.) To the contrary, it established a reliability and burden threshold for testimony supported by prehypnotic actions.

We adhere to the standards adopted by this Court in *Gonzales* and *Nixon*, and hold that testimony of the hypnotized witnesses is inadmissible absent proof by clear and convincing evidence that the testimony being offered was based on facts recalled and related prior to hypnosis.

C

Where the reviewing court finds that evidence was improperly admitted it must also make a determination

regarding whether the error was harmless. As defined by the court rules, "[a]n error in the admission . . . of evidence . . . is not ground for granting a new trial . . . unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). The prosecution asserts that the physical evidence corroborates the eyewitness identification and therefore that any error in the admission of testimony from the hypnotized witnesses was harmless.

Justice Levin, writing for the Court, in *People v Young (After Remand)*, 425 Mich 470, 505; 391 NW2d 270 (1986), defined the standards for determining if an error is harmless.

As an appellate court, we do not independently evaluate this evidence. "[I]t is not the appellate court's function to determine guilt or innocence. . . . Those judgments are exclusively for the jury" Our responsibility is to determine how the error might have affected the jury's decision. The inquiry is "what effect the error had or reasonably may be taken to have had upon the jury's decision."

If it were clear that the erroneous admission of the . . . evidence did not prejudice [the defendant], the error would be harmless. Citing *Kotteakos v United States*, 328 US 750, 763-764; 66 S Ct 1239; 90 L Ed 1557 (1946).

The error in the instant case was prejudicial to defendant. Defendant was identified as the perpetrator of the crime only by witnesses who were hypnotized. The jury was apprised of the fact that the key witnesses for the prosecution were hypnotized, and we do not know what significance it had in their determination of defendant's

guilt. Furthermore, absent the testimony of the hypnotized witnesses, the remaining evidence does not positively link defendant to this crime. Thus we cannot conclude that the evidence against defendant was overwhelming.

The dissent criticizes our conclusion that the error in this case was not harmless for two reasons. The first is because of the "wholesale application of *Nixon* to all the witnesses who were hypnotized . . ." (Slip op, p 3, Boyle, J., dissenting.) However, by accepting the rule as set forth in *Nixon* as clear precedent in this state, there is no need to separate and examine individually each witness' testimony. The dissent's analysis and charge that we have "fail[ed] to engage in any meaningful separate analysis of the testimony of each witness" (Slip op, p 1, Boyle, J., dissenting) is the best fortification of our decisions in *Gonzales* and *Nixon* that all posthypnotic testimony which is not based on prehypnotic memory recalled and related is unreliable.

The second is that we have "[i]nexplicably ignored . . . the fact that the defendant admitted to a cellmate that he 'accidentally' killed the victim while attempting to sexually molest her." (Slip op, p 3, Boyle, J., dissenting.) We note first that the cellmate stated on the record that the only reason he contacted police with any information concerning defendant's purported confession was because he found the crime "sickening." Yet, at the time of trial, the cellmate had pending against him two counts of criminal sexual conduct in the first degree. Further he testified that he received no promises from the state in exchange for his testimony. One month after defendant's trial the cellmate entered into a plea bargain

agreement where these charges were reduced to CSC IV, a misdemeanor. Additionally, defendant testified that he observed his cellmate reading documents pertaining to his case prior to testifying.

The evidence that was particularly incriminating to the defendant was that he was one of three black men in Kent County who owned a 1976 or 1977 black Grand Prix with a red interior.³⁷ Evidence found on the victim's body at the time of the autopsy included a number of short black negroid hairs and reddish-orange carpet fibers, the source being unidentifiable. Additionally, a barrette was combed out of the victim's hair. When the police searched defendant's car, they found several long blond hairs and feathers that allegedly came from the victim's down mittens. Additionally, under the seat, police found a plastic barrette. The barrette found in defendant's car and the one combed from the victim's hair were manufactured by the same company, although the manufacturer could not state specifically that the barrette came from the same package as the barrette found in the victim's hair.

The prosecution brought in various expert witnesses to testify as to the similarities between the physical

³⁷ The witnesses' identification of the vehicle varied regarding whether it was a 1976 or 1977 Grand Prix or Monte Carlo. The police received a list from General Motors of the vehicle identification numbers of all 1976 and 1977 black Pontiac Grand Prixes with "firethorne red carpet." Over five thousand vehicles were manufactured during the two-year period. Three hundred thirty-four vehicles were titled in Michigan, of which twelve were in Kent County. Of the twelve titled in Kent County, three were owned by a black person, one of whom was the defendant. The police did not obtain statistics on Monte Carlos manufactured during 1976 and 1977.

evidence found on the victim and in defendant's car. However, these experts could not positively state that the evidence comparatively matched that produced from defendant's car. As a result of the experts' testimony, the trial judge stated:

As I understand it, Mr. Murray [defendant's attorney] objects to Exhibits 139 through 144³⁸ because they apparently have no probative value other than to show what the authorities have done in an attempt to investigate this matter, and I suppose to head off any defense argument that they didn't do enough.

* * *

But, really, I have been surprised I haven't heard this argument a long time ago. I have been listening to this type of testimony for two days, now. It is really just a failure to link the Defendant with any of the evidence.

The dissent described the trial judge who expressed these doubts as "a scrupulously fair judge" (Slip op, p 4, Boyle, J., dissenting). We agree.

Although the totality of the evidence makes for a stronger circumstantial case, the physical evidence was not overwhelming, even though circumstantially significant. It has a limited probative value, absent the eyewitness identification of defendant, and therefore we cannot conclude that all reasonable doubts would have been eliminated in the jurors' minds.

³⁸ Exhibits 139 through 144 consisted of hair fragments described as being of Negroid origin that were found on the victim's body and clothing. Additionally Exhibit 142 also contained several orange fibers found on the gag.

III

We now turn to the question whether the similar acts evidence offered by the prosecution was properly admitted.

A

The prosecution was allowed to admit the testimony of ten-year-old Judy Sanchez and nine-year-old Amy Combs over objection. The trial court endorsed the witnesses pursuant to MRE 403 and 404. They testified that on February 6, 1979, approximately one week prior to this incident, a black man in a black car approached them while they were walking to school. Defendant did not work on February 6, 1979. He called in sick and claimed to have been home all day.

The testimony of the two girls varies somewhat, although they generally testified that the man stopped his car and put one foot outside the door. He asked them for the time and the location of Hall Street. The girls responded to the questions, and after doing so the man motioned to the girls to come closer to the car. Both girls testified that they were scared and that the man recognized their fear. Judy had apparently run from the car, but Amy had stayed longer. As Judy gradually came back, the girls testified that the man got into the car and left.

The two girls identified defendant from a mugbook consisting of six photographs.³⁹ Both girls identified

³⁹ Amy Combs on her first viewing of the book identified someone other than Albert Lee. However, she was asked by the

defendant in a corporal lineup on March 29, 1979. While participating in the corporal lineup on March 29, Judy Sanchez identified two persons, one being the defendant and a second individual who's voice she felt sounded closest to the person. At trial neither of the two girls were able to positively identify the defendant as the man who approached them on February 6, 1979. On cross-examination Judy Sanchez made the following statement concerning the in-court identification of defendant:

Q.: Judy, you are not saying that this man, here, Mr. Lee, Albert Lee, is the man you saw on that particular date, are you?

A.: No it [sic] looks the closest description to the guy.

Amy Combs testified that she was "pretty sure, but not positive" that Mr. Albert Lee was the man who approached her and Judy.

B

The introduction of similar acts evidence is an exception to the general rule that evidence of other crimes is inadmissible.⁴⁰ In order to be admissible, the prosecution

(Continued from previous page)

police officers to go through the book a second time more carefully and thoroughly. Following her second viewing of this picture book she did identify defendant as the man who had approached them on February 6. At trial she stated that on the first viewing she did not pick defendant because of the mustache he had in the picture

⁴⁰ Prior to the introduction of the similar acts testimony the trial judge gave the following instruction:

(Continued on following page)

must show a high degree of similarity between the charged and uncharged acts. These standards are to be strictly applied and have been narrowly defined by this Court in an attempt to safeguard the defendant's right to a fair trial. The policy consideration underlying the safeguards are an attempt to avoid convicting the defendant because of prior misconduct rather than on the proofs of the charged offense. The standards governing the admissibility of similar acts testimony were set forth by this Court in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982).

[B]efore evidence of defendant's other misconduct may be admitted: (1) there must be substantial evidence that the defendant actually perpetrated the bad acts sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act and, in light of the slightly different language of MRE 404(b) we

(Continued from previous page)

You are the sole judges of whether to believe any such testimony. However, should you believe such evidence, you are cautioned that it is before you for a limited purpose. That is, for the purpose of determining if it tends to show the identity of the assailant of [the victim] on February 12, 1979.

This evidence must not be considered by you for any other purpose. You must not, for instance, regard this evidence as showing that the Defendant is a person of bad character or that he has the disposition to commit crimes. You must not convict the Defendant because you believe he is guilty of some other improper conduct.

add, opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant's guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice.

The two girls testified that it was a black man in a black car that approached them on their way to school. That alone probably does not constitute substantial evidence to show that it was defendant who committed the bad act. However, there was testimony that defendant is one of three black men in Kent County who owns a black Pontiac Grand Prix, and, that defendant was absent from work on February 6, 1979, and could not verify his whereabouts.

The facts which weigh against the substantiality of the evidence include defendant's own testimony that he was not the man, and, additionally, the tentativeness of the girls identifications. Further, one of the girls testified that the man did not have a mustache. Defendant had a mustache and noticeable sideburns a week later on February 12, 1979.

Although the identification of defendant was tentative, the identification is bolstered because two witnesses identified defendant. This alone would not constitute substantial evidence. However, the identifications, coupled with the fact that the man had a black car and that defendant drives a black car, as well as the fact that defendant did not go to work on February 6, leads us to conclude that the prosecution has shown by substantial evidence that defendant was the perpetrator of the similar act.

To test whether there is a special quality or circumstance sufficient to justify admission of the evidence on the issue of identity, this Court has made the following statements:

It is the distinguishing characteristics which constitute the acts as similar within the meaning of . . . MRE 404(b), not the fact that all constitute the same crime or are violative of the same statute. The distinguishing, peculiar or special characteristics which are common to the acts and thus personalize them are said to be the defendant's "signature" which identifies him as the perpetrator [*People v Major*, 407 Mich 394, 398-399; 285 NW2d 660 (1979).]

Where . . . the only conceivable justification for admission of such similar-acts evidence is to prove the identity of the perpetrator, the link is forged with sufficient strength to justify admission of evidence of the separate offense only where the circumstances and manner in which the two crimes were committed are "[s]o nearly identical in method as to earmark [the charged offense] as the handiwork of the accused. Here much more is demanded than the repeated commission of crimes of the same class, The [commonality of circumstances] must be so unusual and distinctive as to be like a signature. . . ."

It is because of the combined value of those two factors, the unique and uncommonly distinctive style employed by the defendant in committing the "substantially proved" uncharged similar offense, and the same distinctive *modus operandi* employed in the charged offense, that the jury is permitted to infer, if it believes the evidence, that both crimes were the handiwork of the same person, the defendant.

* * *

It is the uniqueness and distinctiveness with which both crimes were committed, combined with the proof that the defendant committed the "like act," that is the key. [*People v Golochowicz*, *supra* at 310-311 (citations omitted).]

The similarity between the two incidents upon which the prosecutor bases its admission are that (1) both incidents involved a black man driving a black car, (2) each occurred in the early morning hours when children would be walking to school, (3) both incidents involved young girls, and (4) both occurred in the same general area. Generally, it could be argued that these factors are not peculiar or do not constitute the defendant's signature because they are common to many child molestation cases. However, the manner and circumstances of stalking and attracting victims can be and is, in this case, sufficiently distinctive and unique that it can pass the *Golochowicz* "signature" requirement. Child abduction cases, in the overall scheme of criminal activity, are rather rare and unique and relate to aberrant behavior, i.e., there is really no "run of the mill" child abduction, as in the case of a run of the mill robbery, or car theft. The coaxing of these two girls to the actor's car is in and of itself somewhat distinctive and, when coupled with the similarities in place and time, lend to the entire act a uniqueness and distinctiveness.

The central issue in this case is identity. The evidence is material because identity is the only proposition at issue. Identity is a material issue, not because it is a factor of proof in generally all criminal cases, but because the defense has made it a genuinely controverted matter.

Here, defendant does not offer any explanation for the killing, i.e., that it was unintentional or that he had some innocent purpose in inviting the victim into his car, rather he offers only an alibi defense that he could not have been the person to commit the act. Thus, the evidence, if admissible at all under MRE 404(b), could be used only to show identity.

Defendant claims that he was prejudiced by the manner in which the prosecutor argued the similar acts incident. The trial judge did not abuse his discretion in finding that the probative value of the evidence outweighs its prejudicial effect.

In his closing argument, the prosecutor argued that Amy Combs and Judy Sanchez were in fact lucky to have gotten away from this man. He argued that what happened to the victim was intended by the defendant with regard to the two girls, however, it did not come about. Thus, in effect, the prosecution stressed the defendant's bad character and his propensity to commit such an act. Although the prosecution agrees with the defense that the acts towards Judy Sanchez and Amy Combs did not constitute a crime, he argued that the acts in effect constituted an attempt, that the defendant intended to kidnap and kill the two girls. In his closing argument the prosecutor stated:

[I]n addition to those three eyewitness, you heard some testimony, quite frankly, if you listened to it, the implications of what may have happened probably had to scare you a little bit, and that was Amy Combs and Judy Sanchez, and they described an incident that sounded awfully familiar, except for the ending, as to what happened to [the victim].

* * *

He said, "Come here." Why did he ask her to "come here"? Why did he ask her to do that? Not only did he do it once, he did it a couple of times. Mr. Murphy will say, "Well there is nothing wrong with what that person did, even assuming it was Mr. Lee, but we don't know what he wanted to do to her." Fortunately, Amy Combs ran away before he ever got a chance. But again, who did both of them identify? Just another coincidence. It was Albert Lee.

* * *

The law says that I can bring these people in here to prove to you the identity of the person, the abductor and murderer of [the victim herein]. Again, compare all the similarities of what almost happened to those little girls to what did happen to [the victim], and it scares us.

It is clear that the prosecutor's closing arguments were specifically designed to convey to the jury an improper purpose for the evidence. Indeed the trial judge gave a cautionary instruction to the jury concerning the limited scope for which the evidence could be considered. In light of the fact that we have ordered a new trial on the basis of the hypnosis issue, we hold that in and of itself (i.e., absent the prosecutor's arguments) the similar acts evidence is more probative than prejudicial. While the prosecutor's use of the evidence was inappropriate in this trial, on this record the evidence was admissible. We are confident that on retrial the prosecution will confine its arguments within the permissible scope of MRE 404.

Conclusion

Defendant was prejudiced to the extent that reversal is required on the basis of the admission of identification

testimony by hypnotized witnesses. Although the ruling of this Court in *Gonzales* was not available at the time of trial, defendant is entitled to the benefit of the *Gonzales* holding on the basis of the retroactivity analysis under *Nixon*. The prosecution has failed to show by clear and convincing evidence that the hypnotic process and the resulting testimony was reliable and based on the facts recalled and related prior to the hypnotic sessions.

On this record, the similar acts evidence offered by the prosecution in and of itself complies with the standards of *Golochowicz*.

The decision of the Court of Appeals is reversed, and we remand the matter for a new trial.

Levin, J., concurred with Brickley, J.

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

No. 78005

ALBERT LEE III,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

CAVANAGH, J. (*concurring in part and dissenting in part*).

I join the result and reasoning of the other portions of the lead opinion, though I must write separately to express my dissent from the lead opinion's analysis of the "similar acts" issue in part III(B).

I cannot join the reasoning of part III(B) since I would hold that it was an abuse of discretion for the trial court to have admitted the testimony of the similar acts witnesses at defendant's trial. The similar acts testimony simply does not support the inference that the defendant was about to entice the two young girls into his car, or that he was about to engage them in some other improper or criminal conduct. While this inference is necessary to support the admission of the evidence under MRE 404(b), it would be an abuse of discretion to infer that fact from this record.

If I accepted the lead opinion's reading of the record, however, I might find that the similar acts evidence is admissible under MRE 404(b). See *People v Golochowicz*,

413 Mich 298, 309-312; 319 NW2d 518 (1982). For example, if the testimony did show that the actor had stalked his victims, or sought to attract the two little girls into his car by physically reaching out to them or verbally urging them into his car for no apparent proper purpose, then I might deem such acts to satisfy the requirements of MRE 404(b). On this record, however, the similar acts simply are not so unusual and distinctive as to serve the purposes for which such evidence may be considered by the Jury.¹

I

I accept the summary of the testimony of the similar acts witnesses contained in the lead opinion. (Slip op, pp 27-28.) The lead opinion summarizes the testimony of Amy Combs and Judy Sanchez accurately.²

¹ I need not address whether or not there was substantial evidence to show that the defendant was the man who committed the similar acts (on February 6, 1979), *Golochowicz, supra* at 309, given that the testimony of the similar acts witnesses cannot suffice to meet the requirements of the second prong of the *Golochowicz* test, *Id.* at 309, 310-312.

² "The testimony of the two girls varies somewhat, although they generally testified that the man stopped his car and put one foot outside the door. He asked them for the time and the location of Hall Street. The girls responded to the questions, and after doing so the man motioned to the girls to come closer to the car. Both girls testified that they were scared and that the man recognized their fear. Judy had apparently run from the car, but Amy had stayed longer. As Judy gradually came back, the girls testified that the man got into the car and left." (Slip op, p 27.)

The lead opinion characterizes the similar acts testimony in a manner that the record does not support by describing the two witnesses' version of events according to what may have occurred when the black man stopped the two young girls, rather than what actually happened to them. The acts of the man who stopped Amy Combs and Judy Sanchez may have been a prelude to a child abduction, as the lead opinion suggests (slip op. p 32), but the girls did not testify to that.

Indeed, I am persuaded the record fails to support the lead opinion's interpretation of the testimony of the similar acts witnesses.³ While the lead opinion states that the girls only testified that the defendant was urging them to come closer to the car,⁴ it then draws unsupported conclusions from this testimony that the man who committed the "similar act" was "stalking" the two young girls.⁵

³ The lead opinion interprets the similar acts testimony as follows:

"[T]he manner and circumstances of stalking and attracting victims can be and is, in this case, sufficiently distinctive and unique that it can pass the *Golochowicz* 'signature' requirement. Child abduction, in the overall scheme of criminal activity, is rather rare and unique. . . . The coaxing of these two girls to the actor's car is in an of itself somewhat distinctive and, when coupled with the similarities in place and time, lend to the entire act a uniqueness and distinctiveness." (Slip op, p 32.)

⁴ Slip op, p 27.

⁵ The lead opinion suggests that the actions of the man who stopped these two young girls is analogous to "child abduction." (Slip op, p 32.) Yet, on this record, with only the testimony of the two girls to describe what happened on

(Continued on following page)

The similar acts evidence shows only that a man stopped the two young girls on February 6, 1979, to urge them to come closer to his car (i.e., as close as six feet), at which time he asked them the time of day and for directions. Any speculation by this Court about whether this man intended to carry out some improper (or criminal) intent is only speculation and has no record support. The circumstances of this incident do not indicate that the man intended to abduct the two young girls, though he may have secretly harbored such an unlawful intent. Moreover, the man's behavior can as well be explained as motivated by a totally innocuous purpose.

Perhaps, this court could assume facts not in evidence because the "similar acts" incident bears such a close resemblance to the fears of all parents who have worried that their children will talk to a stranger while walking alone to school. I would reject that approach, however, for obvious reasons. This Court cannot simply take judicial notice of the fact that a black man who stops young white girls to ask them the time of day and for directions is engaged in acts that are a prelude to a child abduction. Since the lead opinion makes unsupportable assumptions about the quality of the similar act that are necessary to the finding that the similar act was so unique and distinctive when compared to the charged

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February 6, 1979, the trial court could not have legitimately drawn the inference that the similar acts testimony was evidence of an attempted abduction. On appeal, the prosecutor conceded that the man's behavior does not even amount to an inchoate crime of any sort.

offense as to constitute a "signature," *Golochowicz, supra* at 310-311, I must dissent.

II

The reasoning of the lead opinion does not address the question whether the similar acts evidence will be admissible on retrial. Rather, the lead opinion holds only that "[w]hile the prosecutor's use of the evidence was inappropriate in this trial, on this record, the evidence was admissible."⁶ Nevertheless, there remains the important issue whether the analysis of the lead opinion can be applied if the prosecutor seeks to introduce the same evidence on retrial. The similar acts evidence may well be inadmissible, under the reasoning of the lead opinion, if the prosecutor on retrial cannot prove with substantial evidence that a black man driving a black car committed the charged offense.⁷

We simply do not know whether there will be any additional evidence to supplement this record in proving that the charged offense was committed by a black man driving a black car. The evidence in this record contains proof of that fact only if the hypnotized witnesses' testimony is admissible. Yet, the evidence is necessary to show the uniqueness and distinctiveness of the "similar act" because it links the similar act to the charged offense in the manner required by MRE 404(b).

⁶ Slip op, p 34.

⁷ See discussion below.

Under the first prong of the *Golochowicz* four-part evidentiary safeguards, there must be "substantial evidence that the defendant actually perpetrated the bad act sought to be introduced," *Id.* at 309. In analyzing this prong of the test, the lead opinion finds that there was substantial evidence to show that the defendant was the perpetrator of the similar act. The lead opinion reaches this conclusion, despite the tentativeness of the witnesses' eyewitness identification of him, because of two additional, and crucial, facts:

"[1] the man had a black car and that defendant drives a black car, [and]

"[2] that defendant did not go to work on February 6. . . ." ⁸

The fact that the defendant did not go to work proves very little, since it is the prosecutor's burden of production and persuasion to prove by substantial evidence that the defendant committed the similar act.⁹

The fact that the perpetrator of the charged offense was a black man and drove a black car plays an important role in the lead opinion's finding that this "similar acts" evidence was properly admitted for an additional reason. Under the second prong of the *Golochowicz* standard, when (as here) "the only conceivable justification

⁸ Slip op, p 30.

⁹ The defendant is not required to give proof of an alibi in his own defense in order to justify the exclusion of evidence of extrinsic acts if the prosecutor cannot prove with substantial evidence that, given the qualities of the charged offense and the similar act, he was the perpetrator of both acts.

for admission of such similar-acts evidence is to prove the identity of the perpetrator, . . . 'the commonality of circumstances [between the act and the charged offense] must be so unusual and distinctive as to be like a signature,' " *id.* at 310-311 (citation omitted);¹⁰ *People v. Hall*, 433 Mich 573, 588; 447 NW2d 580 (1989), slip op, p 14.¹¹ Indeed, if there is no substantial evidence linking the similar act to the charged offense, then there is no basis for the admission of the similar acts evidence to prove identify under MRE 404(b).

In analyzing the second prong of the *Golochowicz* standard, the lead opinion relies, in large part, on the fact that a black man driving a black car was seen both during the commission of the charged offense and during the similar act; indeed, this fact serves as the key factor

¹⁰ The finding of similarity between the similar act and the charged offense cannot be dispensed with since it, "assures thereby that evidence of the separate offense is probative of some fact other than the defendant's bad character . . . [namely, that] the circumstances and manner in which the two [acts] were committed are '[s]o nearly identical in method as to earmark [the charged offense] as the handiwork of the accused. . . .'" *Id.* at 310, citing McCormick, Evidence (2d ed), § 190, p 449.

¹¹ In *Hall*, the plurality stated that "[t]o be sure, where the prosecution uses similar acts to provide the identity of a perpetrator, the commonality of circumstances must be unique and distinctive." While this language is dicta from a plurality opinion by Justice Boyle (joined only by Justice Griffin and the Chief Justice), that sentence is nevertheless an accurate statement of the law.

which proves the similarity between the charged offense and the similar act that MRE 404(b) requires.¹²

Given today's holding that the testimony of the hypnotized witnesses who saw a black man in a black car at the scene of the charged offense "is inadmissible absent proof by clear and convincing evidence that the testimony being offered [to show that it] was based on facts recalled and related prior to hypnosis," (slip op, pp 23-24), the testimony of these witnesses may be inadmissible upon retrial.¹³

Archer, J., concurred with Cavanagh, J.

¹² The lead opinion reasoned that the similar act is sufficiently unusual and distinctive when compared to the charged offense because both acts share four factors in common:

"The similarity between the two incidents upon which the prosecutor bases its admission are that (1) both incidents involved a black man driving a black car, (2) each occurred in the early morning hours when children would be walking to school, (3) both incidents involved young girls, and (4) both occurred in the same general area." (Slip op, pp 31-32.)

¹³ The fact that the charged offense was committed by a black man in a black car was established at the first trial by the testimony of the hypnotized witnesses. In fact, these witnesses were the only ones who identified the racial background of the perpetrator of the charged offense and the color of the car he drove at the scene of the abduction on February 12, 1979.

The trial court considered the testimony of the hypnotized witnesses in making a preliminary ruling on the admissibility of the "similar acts" evidence under MRE 404(b).

The lead opinion states:

"[the testimony of the two girls] alone probably does not constitute substantial evidence to show that it was defendant who committed the bad act." Slip op, p 30.

STATE OF MICHIGAN
SUPREME COURTPEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

No. 78005

v

ALBERT LEE III,

Defendant-Appellant.

BOYLE, J. (*dissenting in part and concurring in part*).

We dissent. The majority has applied the *Frye/Davis* test and reversed the defendant's conviction despite the fact that the defendant was identified by witnesses who were never subjected to suggestion. Further, the majority fails to engage in any meaningful separate analysis of the testimony of each witness. The overwhelming evidence in this case convinces us that the conviction of Albert Lee, III, did not constitute a miscarriage of justice. We concur only in Justice Brickley's result that the prior act testimony, MRE 404(b), was properly admitted, although we do not endorse the reasoning.

The point ignored by the majority in this case is that at the time of the initial hypnosis, the identity of the defendant was unknown to the police officers. Thus, on this record it is indisputable that there was no connection between that hypnosis and the witnesses' later selection of the defendant from a lineup. Secondly, since the defendant's expert witness, Dr. Martin Orne, testified that hypnosis had no bearing on the identification of the car by the four witnesses who identified it before, during, and

after hypnosis as a clean, black Grand Prix, it is indisputable on this record that identification of the vehicle was reliable. Thirdly, Dr. Orne testified that the defendant's ownership of the car was corroborative evidence of the reliability of the identification of the defendant. Finally, and most significantly, Dr. Orne also testified that the identification of the defendant by Jack Hill and Jack Vos was *not* the product of the hypnotic sessions. Despite these undisputed facts, the majority simply avoids any meaningful discrete analysis of the testimony and erroneously concludes that the conviction must be reversed because the identification was corrupted by the "suggestive effect of hypnosis," on the unfounded assumption that the hypnosis *somehow* induced the identification testimony.

The assumption that hypnosis renders a witness incompetent to testify is a proposition we rejected in *People v Nixon*, 421 Mich 79; 364 NW2d 593 (1984). While we did say in *Nixon* that a witness could testify on the basis of facts recalled and related prior to hypnosis, we did not say that this was the only way that "the party offering the testimony" could establish its reliability. *Nixon, supra*, p 90. As this case illustrates, such a broad prophylactic rule is unwarranted.

The majority opinion gives the state another opportunity to show reliability at the retrial it orders today. However, the fallacy in the majority's formulation is that it would appear that comparison of a witness' general description of a suspect with the defendant's actual appearance would rarely produce a conclusion that the taint is dissipated, except in the rare case of a defendant who has unique identifying characteristics. On this record, the

majority formulation in application thus all but obliterates the distinction drawn in *Nixon*.

Even more disturbing, the majority's wholesale application of *Nixon* to all the witnesses who were hypnotized, obscures any meaningful examination of prejudicial error. MCL 769.26; MSA 28.1096. Inexplicably ignored is the fact that the defendant admitted to a cellmate that he "accidentally" killed the victim while attempting to sexually molest her. Consciousness of guilt was shown by a false exculpatory statement that the defendant was at the Secretary of State's office at the time of the abduction. On the morning of Linda Vanderveen's abduction, two men observed a black male, who smoked Kool cigarettes and drove a black car with bicentennial plates, throw something into a dumpster located within one mile of where the victim's body was found. Other evidence established that the defendant smoked Kools, had bicentennial plates, and drove a black car. Linda's knapsack was recovered from the dumpster. Only three black men in Kent County, one of whom was the defendant, owned a 1976 or 1977 Grand Prix with a red interior. A barrette, feathers that came from mittens similar to those of the victim, and long blond hairs were found in the defendant's car. A number of short black negroid type hairs were found on Linda's body, as were orange carpet fibers similar to those in the defendant's car. The testimony of Amy Combs and Judy Sanchez indicated that the defendant had approached two young girls for directions six days before Linda Vanderveen's abduction, one mile from where she was kidnapped. The defendant's admission to his cellmate, if believed by the jury, was itself sufficient to support the verdict. Absent the "tainted"

evidence, the remaining evidence of guilt was compelling. The case was magnificently tried by two able advocates before a scrupulously fair judge. Upon a review of the entire evidence, it cannot be said that Albert Lee, III, did not receive a fair trial. We would affirm the conviction below.

I

In *People v Gonzalez*, 415 Mich 615; 329 NW2d 743 (1982), modified 417 Mich 968; 336 NW2d 751 (1983), we applied the *Frye* test to hypnosis and concluded that testimony which had been "tainted" by hypnosis should be excluded from criminal trials. Two years later, in *People v Nixon*, 421 Mich 79, 90; 364 NW2d 593 (1984), we declined to declare incompetent any witness who had been hypnotized, holding instead that a witness could testify subsequent to hypnosis when the party offering the testimony could show by clear and convincing evidence that the testimony was "based solely on facts recalled and related prior to hypnosis" We are persuaded that *Nixon's* rejection of the rule of incompetence per se is correct. However, having there held that the testimony of a witness who has been hypnotized is admissible if shown to be reliable, it must follow that *Frye v United States*, 54 App DC 46, 47; 293 F 1013 (1923), should not be applied in these circumstances.¹ As the majority's result

¹ The *Frye* test is concerned with the admission of expert testimony deduced from the results of a scientific technique. The issue in these cases is not the admissibility of the testimony of a hypnotist regarding observations or statements

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demonstrates, it can be argued with expert support that every witness who has undergone hypnosis is somehow influenced by that experience. If *Frye* is applied to the testimony of any witness who has been hypnotized, it must follow logically that all such testimony is inadmissible unless and until hypnosis receives general acceptance in the scientific community, the very proposition we rejected in *Nixon*. In short, either we were wrong in *Nixon* and all such testimony is inadmissible per se, or there is a distinction between testimony recalled during hypnosis, as to which *Frye/Davis* may still be applicable, and testimony which has not been affected by hypnosis despite the fact that the witness was hypnotized, as to which *Frye* does not apply.

This case vividly demonstrates that the application of *Frye* to identifying witnesses who have undergone hypnosis forces the state to choose between use of hypnosis during the investigative stage and the potential loss of the witness' testimony at trial, *Nixon, supra*, p 90. We do not agree with the majority's assertion that the loss of testimony in this case results only because the testimony of the witnesses was not preserved prior to hypnosis. Application of the *Frye* rule in this case and virtually all others will exclude subsequent identification if hypnosis is employed prior to actual identification of a defendant.

However, while *Frye* should not be applied simply because of the fact of hypnosis, the basic reason for the

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made during hypnosis but, rather, the admissibility of testimony by lay witnesses in their normal state.

Frye rule obtains, that is, concern whether the traditional means of assuring reliability of testimony are, in a given context, adequate to ensure prosecutorial fairness and just results. Hypnosis undoubtedly poses special problems which justify the application of the heightened reliability standard required in *Nixon*, that is, that reliability must be shown by clear and convincing evidence. Thus, while we would modify the *Nixon* formulation, we would not adopt the rule that the fact of hypnosis applies only to credibility and not admissibility. *United States v Awkard*, 597 F2d 667, 669 (CA 9, 1979), cert den 444 US 885 (1979).²

Courts have taken three basic approaches to the admissibility of posthypnosis testimony: automatic admission, automatic exclusion, and admission conditioned on compliance with detailed procedural safeguards.

Under the first approach, the testimony of a witness who has been hypnotized is viewed as present recollection refreshed by hypnosis. *Awkard, supra*, p 669. The fact and effect of hypnosis apply to weight and not admissibility, *id.*; *State v Brown*, 337 NW2d 138, 151 (ND, 1983); *Chapman v State*, 638 P2d 1280, 1282 (Wy, 1982).

The second approach, inadmissibility per se, was adopted in *People v Shirley*, 31 Cal 3d 18; 181 Cal Rptr 243; 641 P2d 775 (1982). Courts taking this approach typically draw their conclusions from application of the *Frye* rule of scientific acceptance. See *State v Mena*, 128 Ariz 226;

² I would not alter the well established rule that statements made under hypnosis are inadmissible, McCormick, Evidence (3d ed) § 206, p 632.

624 P2d 1274 (1981); *State ex rel Collins v Superior Court*, 132 Ariz 180; 644 P2d 1266 (1982); *Polk v State*, 48 Md App 382; 427 A2d 1041 (1981). Michigan is among those states that initially adopted a rule of inadmissibility per se but thereafter allowed a witness to testify regarding facts recalled prior to hypnosis, *Nixon, supra*; see also *Collins, supra*. As already suggested, permitting a witness to testify as to identification of a defendant after he has been hypnotized is logically inconsistent with the *Frye* rule, since there is not general acceptance in the scientific community of the reliability of posthypnotic testimony.

The third and preferable approach allows admission of posthypnosis testimony when, in the particular case, it is found to be reliable. See *People v Romero*, 745 P2d 1003 (Colo, 1987); *State v Iwakiri*, 106 Idaho 618; 682 P2d 571 (1984); *State v Woodfin*, 539 So 2d 645 (La App, 1989). The reliability centered approach is articulated in *State v Hurd*, 86 NJ 525, 538; 432 A2d 86 (1981), in which the New Jersey court held that the use of hypnosis could satisfy *Frye* in certain instances.³ Thus, in *Hurd*, hypnotically induced recall was held admissible if the proponent of the evidence could show that the use of hypnosis in the particular case was "a reasonably reliable means of restoring a person's memory." *Id.* The *Hurd* court adopted the procedural recommendations of Dr. Orne, the defense expert in this proceeding. *Id.*, pp 545-546.

Compliance with the Orne safeguards does not guarantee admissibility of the testimony; it merely provides a

³ The *Hurd* court's use of *Frye* on a case-by-case basis seems somewhat anomalous since the *Frye* inquiry concerns the "general acceptance" of a scientific principle or method. *Frye*, p 47.

basis to assess its reliability. *Id.*, p 546. Thus, even when the safeguards are followed, circumstances may suggest that the testimony of a witness who has undergone hypnosis is not reliable. For instance, where the posthypnotic testimony is identification of a person known to be under suspicion by a witness who has been previously unable to identify the person, the danger of suggestion through hypnosis is evident. *United States v Valdez*, 722 F2d 1196, 1203 (CA 5, 1984). On the other hand, even where the conditions of hypnosis do not meet the Orne standards, an independent basis for posthypnosis identification may compensate for the deficiencies of the hypnotic session.⁴

⁴ Factors which might be relevant in making this determination would be analogous to those set forth in *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977). These factors are:

"1. Prior relationship with or knowledge of the defendant.

"2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.

"3. Length of time between the offense and the disputed identification. See [*People v*] *Anderson*, 389 Mich [155, 214; 205 NW2d 461 (1973)], for analysis of the curve of forgetting.

"4. Accuracy or discrepancies in the pre-lineup or show-up description and defendant's actual description.

"5. Any previous proper identification or failure to identify the defendant.

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Where posthypnosis identification is otherwise shown to be reliable, the rationale for *Nixon* is served and there is no purpose in limiting identification evidence to facts "related and recalled" prior to hypnosis. As the court noted in *Harker v Maryland*, 800 F2d 437, 442 (CA 4, 1986), suggestibility and memory hardening are concerns whenever a witness makes an identification. While exclusion would certainly remedy those problems, it would also sacrifice probative evidence which might be sufficiently reliable in a particular case to aid in the truth-finding process. In the context of posthypnosis identification particularly, the rule sweeps too broadly, eliminating

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"6. Any identification prior to lineup or showup of another person as defendant.

"7. Still another consideration, not mentioned in [*United States v Wade* [388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)]], but essential to a determination of judging the reliability of the witness's perceptions is the nature of the alleged offense and the physical and psychological state of the victim. 'In critical situations perception will become distorted and any strong emotion (as opposed to mildly emotional experiences) will affect not only what and how much we perceive, but also will affect our memory of what occurred.' 389 Mich 211. (Emphasis in original.)

"Factors such as 'fatigue, nervous exhaustion, alcohol and drugs,' 389 Mich 213 (emphasis in original), and age and intelligence of the witness are obviously relevant. Levine and Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby* [v Illinois, 406 US 682; 92 S Ct 1877; 32 L Ed 2d 411 (1972)], 121 U Pa L Rev 1079, 1102-1103 (1973).

"8. Any idiosyncratic or special features of defendant."

Additional factors would be the existence and amount of corroboration.

reliable and unreliable evidence alike and insuring that, as a practical matter, "the police will seldom dare to use hypnosis as an investigatory tool because they will thereby risk making the witness incompetent" *State ex rel Collins, supra*, p 209.

The more prudent balance should be struck by requiring a preliminary determination of admissibility on a case-by-case basis. Using a flexible test informed in particular by the Orne factors, the court should, pursuant to MRE 104, make a determination of the reliability of the evidence sought to be presented. If posthypnosis testimony is found sufficiently reliable for admission, the parties remain free to make the jury aware of the dangers of hypnosis with expert testimony and to cross-examine the identifying witness as to the conditions of hypnosis and any independent basis for observation.

II

The identity of the defendant was not suggested to any witness during or after hypnosis. The initial hypnotic sessions were conducted by local hypnotist, Robert Mazur, on the day of the abduction and two days later on February 14, 1979. At this time, the police were acting on seven hundred to nine hundred tips, with as many suspects. Since Mr. Mazur himself could have known nothing about the defendant's identity, it is clear beyond question that he could not, even inadvertently, have suggested the identity of the defendant to the witnesses. The second hypnosis of the witnesses was conducted on February 23, 1979, still before defendant became the primary suspect. Commenting on the fact that witness Jack Hill

could make no identification immediately before, during, or after his second hypnosis, Dr. Orne opined that the hypnotic sessions were carried out with some care, and that if the authorities knew who was believed to be responsible for the crime, it was not communicated to the hypnotized individual. While not all of the Orne safeguards were employed in the hypnotic sessions of February 12, 14 and 23, 1979, it is evident on the record that there was no suggestion of the defendant's identity.

As the majority notes, there were seven prosecution witnesses in this case who were hypnotized. (Jack Hill, James Vos, Jack Vos, Greg Start, David Orr, Jr., Timothy Wilcome, and Jim Bonnema). Slip op, p 4. Proper analysis requires an examination of the circumstances surrounding testimony of each of these witnesses' identification.

Jim Bonnema testified only that he saw a clean, black, 1976 or 1977 Grand Prix automobile speeding through the vicinity of the abduction at 8:15 a.m. Bonnema saw a young black man driving the car but could not identify the defendant as the driver. There was additional evidence that the defendant was one of three black men in Kent County who owned a 1976 or 1977 black Grand Prix with a red interior. Nevertheless, Bonnema was unable to give either the color of the interior of the vehicle he saw, nor was he able to give the license number of the car.

Similarly, James Vos was only able to identify the vehicle as a black Grand Prix. Vos was unsure of the year of the vehicle and gave no testimony as to the color of the interior. James Vos gave only a general description of the driver, a twenty- to thirty-year-old black male with a medium afro hair style and a dark leather jacket. He was

unable to identify the defendant as the driver of the vehicle.

Dr. Orne testified that hypnosis had no bearing on the testimony of these witnesses as to identification of the car involved in the abduction:

"Q. [Assistant Prosecutor]: Now, again, you have no difficulty, given the sequence of the identification of the car in this case, that these witnesses who have identified a black Grand Prix actually saw – at least they think they actually saw a black Grand Prix?

"A. [Dr. Orne]: I have no reason to doubt that particularly. I have no reason to agree with it. I take that . . .

"Q. In other words, in your opinion the hypnosis had no effect on that identification of the car.

"A. Given the facts the people identified it before in the same way as they identified it after. If it had been identified as a '76 before, then became a '77 afterwards, then I would worry about the hypnosis having an effect.

"Q. But the mere fact we are talking, now, about the Grand Prix, itself, it was before, it was during, and it was after, and it is your opinion that hypnosis had no effect on that identification?

"A. I'd say reasonably. This is for everyone except Mr. Hill."

Therefore, the trial judge did not err in admitting the testimony of Jim Bonnema and James Vos.

Turning next to the question whether Jack Hill's testimony was shown to be reliable by clear and convincing

evidence, we find ample support for the trial court's Rule 104 determination. There was clear and convincing evidence that Hill's identification was the product of independent recollection. Jack Hill witnessed the last stages of the abduction and identified Mr. Lee at the second line up and at the trial. The abduction occurred at 8:00 a.m. in "good" light. There was very little snowfall at the time. Hill observed the defendant from about four feet away. He spoke briefly with the defendant and noticed a lack of accent or slang. While Hill failed to identify the defendant upon viewing two mugbooks and one corporeal lineup, at the first lineup, all of the participants put their hair in "cornrows." There was nothing in the record to suggest that Hill was suffering from fatigue, nervous exhaustion, or alcohol or drug use, and Hill ultimately picked the defendant out of a corporeal lineup some six weeks after the abduction.

Most significantly, the majority simply fails to acknowledge that Judge Boucher based his ruling on the effect of the hypnosis on Jack Hill on the testimony by the defense expert Orne. Dr. Orne not only testified that there was no deliberate attempt to alter the memory of Mr. Hill though hypnosis, *but also concluded that the hypnosis was not the source of Mr. Hill's memory.*⁵

⁵ Dr. Orne gave the following testimony at the pretrial motion to suppress:

"It is very unlikely, in my view, that the identification which took place was based upon an actual memory of the original events - a personal memory of the original events of either Mr. Hill or Mr. Vos. The reason for that is that if the memory trace was there, the recall was possible, then it should

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It is clear from this testimony that, while Dr. Orne did not believe that Hill's identification was actually based upon memory, Dr. Orne was convinced that the identification was not the product of hypnosis, but of some "third events."

Additionally, Dr. Orne acknowledged at trial that corroborating facts were significant to the determination of whether the testimony was based on actual memory,

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have been elicited either originally before hypnosis or by hypnosis with Mr. Mazur, or by hypnosis with Dr. Rossi. You will recall that the unreliability of hypnosis stems from the fact that you cannot distinguish between actual recall of what you saw and the importation of additional materials, additional details which are confabulated. Nobody questions the fact that hypnosis will facilitate getting recall of what there is in the memory system. So since you didn't get it at those points, the likelihood of what you are getting much later being an actual memory is extremely small.

"[Defense Counsel]: Why is that?

"[Dr. Orne]: Because if it were a memory, it should have come forth earlier and in our view, it is very unlikely that if you have got two people who have repeatedly failed to identify someone and failed to identify him under two hypnotic sessions, failed to bring forth the memory trace, if you will, so that there is recall, then a month and a half later about the same time they both suddenly are able to identify someone, that this new basis for identification comes from their individual memories, their original memories, *it is more likely to come from third events which the two of them somehow shared*, and for that reason it strikes me as extremely unlikely that we are talking about a memory. I don't know whether what they identified is right or wrong. I have no way of judging that. I can only say it didn't appear to come from memory." (Emphasis added.)

and he admitted that he had been unaware of the corroborative physical evidence of blond hairs, carpet fiber, barrette, or feathers prior to his testimony.⁶

⁶ "Q. Would you consider it corroboration, Doctor, again, of the identification of both the car and the person - that the little girl in this case, when she left home that morning, had two barrettes in her hair, and that when she was found, there was only one barrette left on her body, and a barrette of the same kind was found in Mr. Lee's car?

"A. What is a barrette?

"Q. A barrette is to tie your hair back, to hold your hair back, a clip, or whatever you want to call it.

"A. Okay, yeah.

"Q. Would you consider that corroboration?

"A. I would consider that, certainly, a kind of corroboration, right.

"Q. Did Mr. Murphy provide you that information?

"A. No.

"Q. Did he provide you the information about the number of cars in town?

"A. No, he did not.

"Q. Would you consider the fact there were 16 blond hairs found in the back seat of Mr. Lee's car, which are identical in all respects that could be tested for, to the victim's hair? Would you consider that corroboration, again, of the identification of the car and the identification of Jack Hill and Jack Vos?

"A. I think you are really asking me to kind of get outside of what my area of which I am competent in. I would say yes, that is very convincing from one point of view. But in a sense, the real question is where did the identification come from?

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Curiously, the majority asserts that Dr. Orne's comment regarding corroborative evidence was outside the area of his expertise. In fact, Dr. Orne testified that reference to corroborative facts is a means by which experts determine that a posthypnosis memory is a true memory. However, whether Dr. Orne concluded that Hill's identification of the defendant was the result of "third events" or his "alternative hypothesis," i.e., Hill's actual memory, is irrelevant. The fact that identification was not the

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"Q. Again, if the carpet fibers in Mr. Lee's car were identical to fibers found on the girl's clothes, that is, again, another type of corroboration we are talking about?

"A. Again, assuming that the carpet fibers are rare or specific to that car, certainly.

"Q. And the same thing, if feathers found on the girl's clothes were like the feathers found in Mr. Lee's car, would you consider that corroboration?

"A. I consider that kind of evidence certainly germane.

"Q. Mr. Murphy [defense counsel] didn't provide you with that information?

"A. No.

"Q. Now, again, if the testimony shows that after this first line-up at which nobody identified Mr. Lee, from that point until they did identify him at the second line-up, none of those witnesses, that is, Jack Hill and Jack Vos, saw any more pictures of the Defendant, nor saw the Defendant, nor were told or given any information about Mr. Lee by any police officers, nor did they talk to one another. Do you have any idea or opinion as to why they identified him?

"A. As I have indicated before, I don't know. There is an alternative hypothesis. *It could be that is the person that they actually saw.*" (Emphasis added.)

product of the hypnosis stands uncontroverted on this record. Thus, the issue of the reliability of Hill's identification of the defendant was an issue properly submitted to, and resolved by, the factfinder. The trial court's preliminary ruling admitting the testimony of Jack Hill was not erroneous.

Although Jack Vos, the seventeen-year-old son of James Vos, had considerably less time in which to view the defendant than Jack Hill, as with Jack Hill, the testimony by the defense expert, Dr. Orne, is dispositive of admissibility. Dr. Orne's testimony that Jack Hill's identification of the defendant was not the product of hypnosis applied equally to Jack Vos. Moreover, Dr. Orne's testimony as to the significance of the corroborating evidence also applies to Jack Vos. Whatever differences might exist in the initial observation by Jack Vos, there was no error in the admission of his testimony.

Timothy Wilcome was employed as a maintenance man at the Georgetown Apartments on the morning of February 12, 1979. He was cleaning snow at approximately 10:00 a.m. when a black male approached him on foot. The man asked Wilcome for a push, explaining that his car was stuck in the snow. Wilcome agreed to help him, and the two walked to his car. After an unsuccessful attempt to push the car out by hand, Wilcome suggested that they ask his co-worker, David Orr, to pull the car out with his truck.

While Orr hooked up the car, Wilcome spoke to the individual. Wilcome asked for a cigarette and was given a Kool cigarette. Wilcome then pushed the car while Orr pulled the car with the truck. Wilcome testified that the

car was a black Monte Carlo in good condition. He did not notice any particular details about the car or any writing on it but identified it by the body size and shape. Linda Vanderveen's knapsack was uncovered from a nearby dumpster later that day.

Wilcome was interviewed by the investigating officers two days later on February 14, 1979. He was hypnotized by Mr. Mazur and later shown a mugbook containing the defendant's photograph. Wilcome failed to identify the defendant from the photograph and in fact selected another photograph as "close."⁷ The following day, Wilcome was shown a second mugbook without the defendant's photograph. He selected no one.

About ten days later, Wilcome attended the first corporeal lineup in which all of the participants appeared with hair styled in cornrows. He was hypnotized prior to the lineup by Dr. Rossi of the Michigan State Police. Wilcome was unable to pick out the defendant "confidently," but did select the defendant as closest to the man he had seen on February 12. At the March 15 lineup, when the participants appeared in afro-styled hair, Wilcome was again unable to "confidently" pick out the defendant. Again, however, he picked out the defendant as closest in resemblance to the man he had seen on February 12. Wilcome also identified the defendant at trial but was similarly unable to give a "confident" identification.

⁷ My review of the mugbook indicates that number 217, the picture selected by Wilcome, clearly does resemble the defendant. David Orr also selected number 217 out of this mugbook.

The evidence of record establishes that Timothy Wilcome had an excellent opportunity to observe the defendant for some time, including speaking with him. The lighting was good, there was proximity, and there was nothing startling in the encounter. Wilcome failed to identify the defendant at the first photographic viewing, but he did pick out the defendant in the "cornrow" lineup about ten days later.

David Orr also worked in maintenance at the Georgetown Apartments on February 12, 1979. However, Orr had no direct conversation or contact with the defendant and never identified the defendant as the driver of the car. Orr did identify the car as a black Monte Carlo. It appears that Orr's testimony was offered for two purposes: first, to provide a general corroboration of Wilcome's testimony, and, second, to establish that the driver of the car, identified by Wilcome as the defendant, threw something into the dumpster in which Linda Vanderveen's knapsack was found. Orr also testified that the defendant left the scene "in a hurry" after he was towed out of the snowbank.

Here again Dr. Orne's testimony must be examined. Dr. Orne gave no specific opinion either at the pretrial hearing or at trial regarding the effect of the hypnosis on the testimony of Timothy Wilcome. However, the circumstances and quality of Wilcome's initial observation supported the trial court's determination that Wilcome's testimony was based on factors unrelated to the hypnosis.⁸ Further, Dr. Orne, did not believe that the

⁸ Although not all of the Orne controls were used during hypnosis, the circumstances in the hypnotic sessions were the same as those of Jack Hill and Jack Vos, and Orne testified that those sessions were not the source of either witness' testimony.

descriptions of the vehicle were affected by hypnosis. Assuming *arguendo* that Orr's description was unreliable, any error in the admission of this testimony must be deemed harmless. Orr's consistent description of the vehicle as a *Monte Carlo* was, in fact, exculpatory. Orr was never able to give a description of the defendant and never identified him. Thus, the only potential prejudice to the defendant that would flow from the testimony of David Orr is the general corroboration of Wilcome's account of pulling someone out of a snowbank and Orr's testimony that he saw the driver afterward throw something into a dumpster. The admission of this evidence presents no basis for a reversal of the defendant's conviction.

Finally, turning to the testimony of witness Greg Start, Dr. Orne expressed particular concern as to the possibility of hypnotic suggestion in Start's identification. He believed that Start was particularly vulnerable to suggestibility and was concerned about the use of a post-hypnotic suggestion by Dr. Rossi to the effect that Start would be able to identify the person he saw on the day of the incident.⁹ Start, a twelve-year-old safety boy, arrived at his post a few blocks from the scene of the abduction at about 8:00 a.m. on February 12, 1979. He testified that a little while after he arrived at his post, he saw a black Grand Prix with a red interior speed through the intersection. He further testified that the driver of the Grand Prix was a young black man, about twenty-five years old, with

⁹ In contrast, it may be fairly inferred from the trial testimony of Dr. Orne that the other witnesses were not given this suggestion.

a mustache and a three-inch afro. The car went through the intersection "medium" fast. According to Start, the driver looked in his rear view mirror after he went through the intersection. Start saw the same car a few blocks away six or seven minutes later.

Start did not see the car again, but he did see Jack and Jim Vos. They pulled over moments later and asked Start if he had seen a black Grand Prix. Start replied that he had not, but remembered a few minutes later that he had seen a black Grand Prix.

In March or April of 1979, Start saw an article in the Grand Rapids Press about the defendant's arrest. A picture of the defendant ran with the article.

Start was finally contacted by the investigating officers on May 2, 1979. The record is unclear as to whether he was shown mugbooks with the defendant's picture. However, it is clear that Start had seen a picture of a person identified as the suspect prior to being hypnotized by Dr. Rossi on June 19, 1979, and viewing a lineup on June 20, 1979. Start picked out the defendant in the lineup and later identified the defendant at trial.

Unlike the other witnesses whose hypnosis was conducted before defendant became the primary suspect, Start was hypnotized subsequent to defendant's March 29 arrest. The danger of suggestibility as to Start was heightened by the fact that prior to hypnosis, Start had seen defendant's picture in the newspaper and had been given a posthypnotic suggestion. In short, unlike the other witnesses, there is a basis in this record to find both that Start was subject to suggestion as to the identity of the suspect, and that the prosecution has failed to show by

clear and convincing evidence the reliability of his testimony.

Two final observations regarding the hypnotized witnesses are in order. Except as to Greg Start, Dr. Orne found no indication of cuing or suggestion in the hypnotic sessions.¹⁰ Thus, except as to Start, the potential danger of suggestibility was negated on this record. Second, the evidence in this case includes three mugbooks containing a total of 316 pictures. Additionally, there are photographs of three lineups, two containing eight persons and one containing six. As the experienced and scrupulous trial judge observed, the "utterly bewildering array" of mug shots shown the witnesses, together with the care with which the photographic and lineup sessions were conducted, actually increased the reliability of the identification testimony.¹¹

¹⁰ In the interest of time, defense counsel did not provide Dr. Orne with tapes of the hypnosis of David Orr and Timothy Wilcome at the motion hearing. However, counsel instructed Dr. Orne to assume the procedures for these sessions were the same as for the others. Dr. Orne also was not provided with tapes of Jim Bonnema's hypnosis, again presumably in the interest of economy. I note that no question was raised at the motion hearing or at trial about the availability of the tapes.

¹¹ In ruling on the defendant's motion to suppress pretrial and in-court identifications, the trial judge stated:

"[W]hat is amazing here is not any set of circumstances which would force witnesses into identification of this Defendant, but the fact that witnesses purport to make an identification after exposure not to the Defendant repeatedly but to an utterly bewildering array of young, black males whose characteristics in many instances differ in only very subtle respects. It

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Conclusion

For the reasons explained, we would hold that the *Frye* test should not be applied to exclude the testimony of a witness simply because he has been hypnotized. The dangers of hypnosis do, however, require application of a *Hurd*-type test in which the reliability of the testimony must be established by clear and convincing evidence. The test to be employed is flexible; the primary considerations in the reliability determination are whether the appropriate safeguards were employed at the hypnotic session, and whether the testimony offered has a basis independent of hypnosis. So analyzed, we conclude that error occurred in this case only in regard to the admission of Gregg Start's testimony, but that error does not compel reversal.

The Code of Criminal Procedure provides:

"No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court after an examination of the entire cause, it shall affirmatively appear

(Continued from previous page)

seems to me that an equally convincing argument can be made for the assembly of showdowns here, that the reliability of identification has been enhanced, as that it has been made unreliable. Not only were the photographic and line-up sessions not tainted, but they were carried out, in the view of this Court, with scrupulous care given to fairness by personnel of both the Grand Rapids Police Department and the Kent County Sheriff's Department."

that the error complained of has resulted in a miscarriage of justice." MCL 769.26; MSA 28.1096.

The prosecution built an impressive direct and circumstantial case involving over fifty witnesses and six days of trial. The prosecution established that only three cars matching the defendant's car were owned by black males in Kent County. A barrette, matching a second one worn by the victim was found in the back seat of the defendant's car. Feathers, such as those in the victim's gloves, and long blond hairs were also found in the back seat of the defendant's car. Carpet fibers matching those of the defendant's car and negroid type hairs were found on the victim's clothing, and a cellmate of the defendant's testified that the defendant had admitted that he accidentally killed the victim while attempting to sexually molest her. The defendant's alibi was effectively rebutted by testimony that placed him at the Secretary of State's office several hours after the abduction, rather than at the time of the abduction as the defendant testified. —

The erroneous admission of Greg Start's testimony did not result in a miscarriage of justice. The defendant's conviction should be affirmed.

Riley, C.J., and Griffin, J., concurred with Boyle, J.

Order

Entered: February 28, 1990

Michigan Supreme Court

Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

Rehearing No. 227

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT LEE III,

Defendant-Appellant.

SC 78055
CoA 85840
LC 79-024278-FY

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

SEAL OF THE MICHIGAN SUPREME COURT
LANSING

February 28, 1990

Jacqueline B. McKinnon
Deputy Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff-Appellee,

v

ALBERT LEE III,

Defendant-Appellant.

NOV 21 1985

No. 85840
ON REMANDBEFORE: MacKenzie, P.J., and Maher and Beasley, JJ.
PER CURIAM

This case is before us on remand from the Supreme Court for reconsideration in light of *People v Nixon*, 421 Mich 79; ___ NW2d ___ (1985). In *Nixon*, the Court held that a witness who has been hypnotized to enhance recollection is not automatically precluded from testifying and may be effectively cross-examined where the testimony is based on facts recalled and related prior to being hypnotized. In order to ensure that the witness's testimony is based solely on such facts, the party offering the testimony must establish its reliability by clear and convincing evidence.

Our review of the record in this case convinces us that the testimony of the witnesses who had been hypnotized was based on their recollections prior to undergoing hypnosis. See *People v McIntosh*, 142 Mich App 314; ___ NW2d ___ (1985), *aff'd* 422 Mich 948 (1985), *Cf. People v Centers*, 141 Mich App 364; ___ NW2d ___ (1985), *vacated*

in part and remanded 422 Mich 948 (1985). As in *Nixon*, the trial testimony of the hypnotized witnesses in this case was consistent with the facts which they had recalled and related prior to hypnosis. Also as in *Nixon*, the trial court here found that the hypnosis procedures were not suggestive. There was an impressive array of evidence which corroborated the witness's identification testimony. "Although additional safeguards could have been undertaken to ensure that the hypnosis did not taint the witness's prehypnotic recollections, we cannot say that the trial court abused its discretion in allowing the witnesses to testify". *Nixon, supra*, p 91. Accordingly, we find no cause to change the result of our prior unpublished per curiam opinion (Docket No. 51044, rel'd 5/9/83, Maher, J. dissenting).

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Richard M. Maher

/s/ William R. Beasley

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

MAY 09 1983

Plaintiff-Appellee,

No. 51044

v

ALBERT LEE III,

Defendant-Appellant.

BEFORE: MacKenzie, P.J., and Maher and C.W. Simon*,
JJ.

PER CURIAM

After a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548. Defendant was sentenced to imprisonment for life and appeals by right.

I

Defendant was bound over for trial on a charge of first-degree murder on evidence that defendant committed the murder in perpetration of a kidnapping. Defendant argues that the evidence at the preliminary examination was insufficient to show a kidnapping because there was no evidence of asportation other than that which was merely incidental to the murder. Movement of the victim which is merely incidental to an underlying lesser or coequal offense is insufficient to satisfy

*Circuit judge, sitting on the Court of Appeals by assignment.

the asportation element of kidnapping. *People v Adams*, 389 Mich 222, 236; 205 NW2d 415 (1973); *People v Barker*, 411 Mich 291, 301; 307 NW2d 61 (1981). However, in *Adams, supra*, 238, the Court noted:

"If the underlying crime involves murder, extortion or taking a hostage, movement incidental thereto is generally sufficient to establish a valid statutory kidnapping."

See also *People v Fullwood*, 51 Mich App 476, 480-481; 215 NW2d 594 (1974).

II

Defendant's automobile was searched on two occasions. On February 23, 1979, defendant's automobile was searched without a warrant and without defendant's consent; however, no evidence obtained during that search was introduced at trial. Defendant's automobile was again searched on February 26, 1979, this time with defendant's consent. Defendant argues that the search on February 23 was illegal and that the evidence obtained during the search on February 26 should have been suppressed as "fruit of the poisonous tree".

Evidence obtained by exploitation of illegal police conduct must be suppressed as "fruit of the poisonous tree", but evidence obtained by means sufficiently distinguishable to dissipate the taint of illegal police conduct may be admitted. *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). A defendant's consent to a search is sufficient to dissipate the taint of previous illegal police conduct unless the consent was

obtained through exploitation of the illegal police conduct. *Bretti v Wainwright*, 439 F2d 1042, 1045-1046 (CA 5, 1971); *United States v Fike*, 449 F2d 191, 193-194 (CA 5, 1971); *United States v Willis*, 473 F2d 450, 452 (CA 6, 1973); *United States v Hearn*, 496 F2d 236, 242 (CA 6, 1974). Here, assuming without deciding that the search on February 23 was illegal, there is no evidence that the search or anything discovered in the course of it was used to obtain defendant's consent. Defendant did not know of the search on February 23 at the time he consented and contends that he would not have consented had he known. However, defendant does not explain, and we cannot see, how a prior illegal search could change defendant's factual or legal position in a way relevant to defendant's decision to consent. Admission of the evidence seized on February 26 was not error.

III

Defendant raises a number of issues in connection with his identification by eyewitnesses to the kidnapping. Defendant complains that he was not represented by counsel at two photographic displays. In *United States v Ash*, 413 US 300; 93 S Ct 2568; 37 L Ed 2d 619 (1973), the Court held that US Const, Am VI did not require that an accused be accorded the right to counsel at a pretrial photographic display. However, in *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), a case decided before *Ash*, the Court held:

"1. Subject to certain exceptions, identification by photograph should not be used where the accused is in custody.

"2. Where there is a legitimate reason to use photographs for identification of an in-custody accused, he has the right to counsel as much as he would for corporeal identification procedures." (Footnotes omitted.)

In *People v Jackson*, 391 Mich 323, 337-339; 217 NW2d 22 (1974), the Court held that, in the exercise of its constitutional power to establish rules of evidence applicable to proceedings in Michigan courts, it would continue to require adherence to the rules stated in *Anderson* despite *Ash*. Here, however, defendant was not in custody at the time of the photographic displays. Some authority indicates that, despite the use of the words "in custody" in the language from *Anderson* quoted above, the right to counsel applies to any photographic display conducted while the investigation has focused on defendant. *People v Cotton*, 38 Mich App 763, 769; 197 NW2d 90 (1972); *Anderson*, *supra*, 180-182; *Jackson*, *supra*, 338. However, testimony at the pretrial evidentiary hearing showed that, at the time of the photographic displays, the police were pursuing literally thousands of tips, that approximately 50 suspects other than defendant had been interviewed by the police, that six or eight suspects other than defendant had been interviewed more than once, and that at least one other suspect had been asked by the police to take a polygraph examination. Defendant points to a third photographic display which took place at a later stage of the investigation; however, as testimony showed that no photograph of defendant was included in that display, we cannot say that the *Anderson* rule applied. The evidence recounted above shows that the investigation had not yet focused on defendant at the time of the two

photographic displays in which defendant's picture was included.

An identification procedure may be so unnecessarily suggestive and conducive to irreparable misidentification as to deny a defendant due process of law. *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). One of the photographic displays at issue here contained 152 photographs and the other contained 88. Defendant was one of 12 persons whose photographs appeared in both books, but different photographs of defendant were used. A third book of 77 photographs was shown to some witnesses, but it contained no photograph of defendant. At subsequent corporeal lineups, defendant was represented by counsel and at one defendant's hairstyle was changed to correspond to that of other participants. We discern nothing suggestive in these procedures.

Defendant complains that a number of the eyewitnesses to the kidnapping were hypnotized. Most of the early cases from other jurisdictions dealing with the testimony of a witness whose memory was refreshed under hypnosis held that such testimony was admissible and that hypnotism was merely a factor to be considered by the trier of fact in evaluating credibility. See *Harding v State*, 5 Md App 230; 246 A2d 302 (1968), and the cases discussed in Anno: Admissibility of Hypnotic Evidence at Criminal Trial, 92 ALR 3d 442, § 8, pp 461-464. More recent cases have held that the testimony of a witness whose memory was hypnotically refreshed is inadmissible. *State v Hurd*, 173 NJ Super 333; 414 A2d 291 (1980); *State v Mack*, 292 NW2d 764 (Minn 1980); *State v Mena*,

128 Ariz. 226; 624 P2d 1274 (1981); *People v Shirley*, 31 Cal 3d 18; 181 Cal Rptr 243; 641 P2d 775 (1982).

The first Michigan decision to address this problem in any detail was *People v Gonzales*, 108 Mich App 145; 310 NW2d 306 (1981), in which this Court held that testimony as to recollections induced by hypnosis was inadmissible. The Court reasoned that such testimony was scientific evidence and that hypnotism was not a technique which had gained general acceptance in the area to which it belonged. Compare *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923); *People v Barbara*, 400 Mich 352; 255 NW2d 171 (1977), and *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). The Court concluded that hypnotism could nevertheless be used as an investigative tool without tainting the subsequent testimony of the witness provided that strict safeguards were followed to insure that the testimony was based on what the witness recalled before hypnotism. *Gonzales, supra*, 159-161.

The rule stated in *Gonzales* was indorsed in *People v Wallach*, 110 Mich App 37, 72-74; 312 NW2d 387 (1981), and in *People v Nixon*, 114 Mich App 233, 237; 318 NW2d 655 (1982). However, in *People v Jackson*, 114 Mich App 649, 663; 319 NW2d 613 (1982), the Court held:

"[W]e find that the standards set forth in *Gonzales* have only prospective effect. For trials which occurred prior to the release date of *Gonzales*, or within 20 days after that decision was released, we hold that testimony concerning pre-hypnotic recollections is admissible to the extent that the trial court is left with a belief that the witness's testimony actually was remembered prior to the hypnosis. Applying this standard to the instant case, we find that the

trial court justifiably could have concluded that the witness's testimony was limited to prehypnotic recollections."

The Court of Appeals decision in *Gonzales* was reviewed in *People v Gonzales*, 415 Mich 615; ___ NW2d ___ (Docket No. 67765, decided 12/23/82). The Supreme Court agreed with the Court of Appeals that testimony as to recollection induced by hypnosis was inadmissible and that use of hypnosis as an investigative tool was permissible. However, the Supreme Court held that a witness who had been hypnotized for investigative purposes could no longer testify. The Court recommended preservation of the prehypnotic testimony of such a witness by a deposition which could later be used at trial pursuant to MRE 804(b)(1) because hypnotism rendered the witness unavailable.

The trial here was conducted before the Court of Appeals decision in *Gonzales*. Three factors must be taken into account in deciding whether a new rule of law should be applied retroactively: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect of retroactivity on the administration of justice. *Linkletter v United States*, 381 US 618, 636; 85 S Ct 1731; 14 L Ed 2d 601 (1965); *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). The purpose of the new rules stated in the *Gonzales* decisions is to protect the due process rights of defendants by preventing the admission of distorted testimony. However, the authorities from other jurisdictions discussed above show that, until quite recently, the overwhelming weight of authority indicated that hypnotism did not render the testimony of a witness

inadmissible. If the *Gonzales* decisions are applied retroactively, police and prosecutors who acted in good faith reliance on the old rule will find that their cases have become irrevocably tainted.

In *Stovall v Denno*, *supra*, the Court considered an analogous question concerning the retroactivity of the standards stated in *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), and *Gilbert v California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967), concerning corporeal lineups. The *Stovall* Court pointed out that *Wade* and *Gilbert* established procedural rules for conducting lineups which could not have been anticipated by law enforcement officials. The Court declined to apply the procedural rules stated in *Wade* and *Gilbert* retroactively, but held that cases tried before *Wade* and *Gilbert* should nevertheless be reversed if the identification procedures employed were so unnecessarily suggestive and conducive to irreparable misidentification as to deny the defendant due process. The approach taken in *Stovall* was consistent with that taken in *Jackson*, *supra*, in determining whether the Court of Appeals decision in *Gonzales* should be applied retroactively. *Stovall* and *Jackson* convince us that the *Gonzales* decisions should not be applied retroactively, but that reversal is nevertheless required in a pre-*Gonzales* case if defendant was prejudiced by admission of testimony as to recollections induced by hypnosis.

Here, the record made and the procedures followed in hypnotizing the witnesses would not have satisfied the standards stated in the Court of Appeals decision in *Gonzales*, but the record satisfies us that no recollections induced by hypnotism were admitted. At issue is the testimony of Jack Hill, Jack Vos, Jim Vos, David Orr,

Timothy Wilcome, and Greg Start. Of these witnesses, only Jack Hill and Greg Start positively identified defendant at trial. Jack Vos said that defendant looked just like the man he saw, but that he could not say positively that defendant was the man. Timothy Wilcome also said that defendant looked like the man but that he could not be positive. Jim Vos and David Orr said that they did not see the man well enough to identify him.

The record available for resolution of this issue included incomplete tape recordings of the hypnotic sessions, testimony of one of the hypnotists as to the procedures followed, and testimony as to what the witnesses told the police at various stages of the proceedings. Defendant produced as an expert witness Dr. Martin Orne, an eminent expert in this field. Dr. Orne testified that hypnotism tends to induce confabulation, which is the filling-in of gaps in the memory with imaginery but plausible details. Dr. Orne reviewed the record of the hypnotic sessions here. The only specific instance of suggestiveness to which Dr. Orne could point was a post-hypnotic suggestion given to some witnesses that they would later identify someone. It is not clear from the record that this suggestion was given to the witnesses at issue here. Assuming, however, that it was, the evidence does not support a conclusion that the suggestion affected the testimony of the witnesses. There is no evidence that the identification procedures employed here were otherwise suggestive. If four witnesses were to independently confabulate details, we would expect those confabulated details to be inconsistent unless they were all exposed to other suggestions. Here, in contrast, the testimony of Jack Hill, Greg Start, Jack Vos, and Timothy

Wilcome was perfectly consistent. Moreover, even if Jim Vos and David Orr were exposed to a suggestion that they identify someone, that suggestion obviously did not affect their testimony.

Dr. Orne also was of the opinion that Jack Hill and Jack Vos must have been exposed to something suggestive because an initial hypnotic session did not lead to them identifying defendant in the course of a photographic display but they were able to pick defendant out of a corporeal lineup after further hypnotism. A more plausible and less speculative explanation for these events is that the witnesses found it easier to identify defendant in person than from pictures. We cannot say that the identification procedures employed here were unnecessarily suggestive or conducive to irreparable misidentification.

IV

Billy Mansfield, who shared a cell in the Kent County Jail with defendant while defendant was awaiting trial, testified to a number of inculpatory statements made to him by defendant. Defendant argues that this testimony should have been suppressed as obtained in violation of his right to counsel under the rule stated in *Massiah v United States*, 377 US 201; 89 S Ct 1199; 12 L Ed 2d 246 (1964), and *Brewer v Williams*, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977). In *United States v Henry*, 447 US 264, 270-271; 100 S Ct 2183; 65 L Ed 2d 115 (1980), the Court explained that the right to counsel was violated when the government intentionally created a situation likely to induce a defendant in post-indictment custody to make

incriminating statements without the assistance of counsel. In *Henry*, the government placed a paid informant in defendant's cell, knowing that the informant was likely to be able to engage defendant in conversation without suspicion. The informant was given financial incentives to produce useful information, although he was ostensibly instructed not to initiate conversation about the charged offenses with defendant. Here, in contrast to *Henry*, there is no evidence that Mansfield was a government informant or had any relationship with the authorities other than that of prisoner and captor before defendant made the inculpatory statements. As Mansfield merely spontaneously reported to the government what he had learned, the government cannot be said to have intentionally created a situation likely to induce defendant to confess.

Defendant also argues that Mansfield's testimony was unworthy of belief. However, the credibility of a witness who testifies to a confession is a question for the trier of fact. *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981).

Defendant also argues that he was denied due process when Mansfield testified, without objection by the prosecution, that no promises had been made to him in return for his testimony. In *Napue v Illinois*, 360 US 264; 79 S Ct 1173; 3 L Ed 2d 1217 (1959), the Court held that defendant had been denied due process because an accomplice who became the principal witness against defendant falsely testified that he had been promised no consideration for his testimony and because the Assistant State's Attorney handling the case had known this testimony to be false. See also *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976), in which the Court held that

the prosecution had a duty to disclose any promise of leniency made to an accomplice or coconspirator to secure his testimony and any reasonable expectation of leniency which such a witness had.

Here Mansfield had not been promised anything specific, but had been told that his cooperation in testifying would be "taken into consideration" in regard to various charges pending against him. We will assume without deciding that the rules stated in *Napue* and *Atkins* apply to a witness like Mansfield who was neither an accomplice nor a coconspirator. We will also assume without deciding that the extremely nebulous representations made to Mansfield amounted to a promise of leniency. It is nevertheless clear that no error occurred. The representations made to Mansfield were disclosed to the defense on the record at a pretrial hearing. The prosecuting attorney for Kent County later took the stand at trial and testified to the representations made. We cannot say that such a procedure was insufficient to comply with the mandates of *Napue* and *Atkins*.

V

The prosecution produced as witnesses a nine-year-old schoolgirl and a ten-year-old schoolgirl, who testified that, six days before the commission of the crime, they were approached while on their way to school in the morning by a man resembling defendant and driving a car similar to the car used in the crime. The man tried to coax the girls to approach him. Defendant argues that the trial court erred by admitting this testimony to show his identity as the perpetrator of the crime.

In *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), the Court stated a four-part test for admission of evidence of other misconduct by defendant:

"(1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act and, in light of the slightly different language of MRE 404(b) we add, opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant's guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice."

The "substantial evidence" by which the prosecution is required to show that defendant perpetrated the act sought to be introduced need not amount to proof beyond a reasonable doubt. Here neither witness could positively identify defendant as the man who approached them, but both indicated that defendant closely resembled the man. Such evidence was sufficiently substantial to justify admission of the testimony. The circumstances of the prior act were sufficiently special and similar to the circumstances leading up to the charged offense that proof of defendant's identity as the perpetrator of the prior act tended to prove defendant's identity as the perpetrator of the charged offense. In both instances, grade-school-aged girls were approached in the early morning hours just before school by a man in a big black car who got out of the car and attempted to lure the girls into approaching him more closely. Defendant's identity

as the perpetrator of the charged offense was highly material. The evidence here showed not a prior complete offense similar to the charged offense, but merely actions by defendant similar to those taken to initiate the charged offense. On this record, we cannot say that the trial court abused its discretion by determining that the probative value of this testimony outweighed its prejudicial effect. We cannot say that this testimony was erroneously admitted.

VI

Defendant argues that the evidence was insufficient to sustain his conviction. Evidence is sufficient to sustain a conviction if, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that every element of the crime was proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). To convict defendant here, the jury had to find a killing with malice in the perpetration of a kidnapping. MCL 750.316; MSA 28.548, *People v Aaron*, 407 Mich 672, 733-734; 299 NW2d 304 (1980). A killing with malice could be inferred from the testimony concerning the state of the victim's body, which was found in a snow drift and which showed signs of strangulation and forcible sexual penetration. A kidnapping could be inferred from the testimony of Jack Hill, who saw defendant force the victim into his car and drive away. Defendant's identity as the perpetrator was established by eyewitness testimony, particularly that of Jack Hill, by defendant's inculpatory statements to Billy Mansfield, and by physical evidence found in defendant's car,

including blond hairs matching those of the victim, feathers similar to those which were leaking from the victim's mitten when she was last seen alive, and a barrette matching one the victim wore. The evidence was ample to sustain the conviction.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Charles W. Simon

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff-Appellee,

Docket # 510144

v

ALBERT LEE III,

Defendant-Appellant.

BEFORE: MacKenzie, P.J., and R.M. Maher and C.W.
Simon,* JJ. R. M. MAHER, J. (Dissenting)

I respectfully dissent.

I disagree with the majority that the Supreme Court's decision in *People v Salvadore Gonzales*, 415 Mich 615; ___ NW2d ___ (1982), barring testimony tainted by hypnosis from criminal trials, applies only prospectively. In *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971), the Supreme Court adopted three factors to be used in determining whether a new law should be applied retroactively or prospectively: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice. This analysis, however, is to be applied only to a *new* rule of law. *People v Phillips*, ___ Mich ___; ___ NW2d ___ (Docket No 67285, December 23, 1982). Where a court decision merely clarifies existing law the decision applies retroactively. See *People v Ideis*,

*Circuit Judge, sitting on the Court of Appeals by assignment.

101 Mich App 179, 182-183; 300 NW2d 489 (1980), *lv den* 411 Mich 854 (1981). Before applying the retroactivity analysis to the *Gonzales* decision, this Court must first decide whether that case announced a new rule of law.

In *Phillips, supra*, (slip op, p 3). the Court said:

"A rule of law is *new* for purposes of resolving the question of its retroactive application * * * either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision."

The *Gonzales* decision overruled no standing precedent in this state. Nor did the Supreme Court announce the issue involved in that case as one of first impression. However, even if it were such an issue the Court's resolution of the question was foreshadowed by previous decisions. In *Gonzales*, the Court applied "the rule of *Frye v United States*, 54 US App DC 46, 47; 293 F 1013, 1014 (1923), limiting the admission of scientific evidence to techniques which have gained general acceptance in the particular areas in which they belong." *Gonzales, supra*, p 622. The Supreme Court adopted the *Frye* rule in several earlier decisions, *People v Becker*, 300 Mich 562, 566; 2 NW2d 503 (1942), *People v Davis*, 343 Mich 348, 370; 72 NW2d 269 (1955), *People v Morse*, 325 Mich 270, 274; 38 NW2d 322 (1949), and reaffirmed its adherence to the rule in *People v Barbara*, 400 Mich 352, 358, 406; 255 NW2d 171 (1977) and *People v Tobey*, 401 Mich 141, 145; 257 NW2d 537 (1977). Thus, the principle underlying the *Gonzales* decision is well-established in Michigan law. The Court reaffirmed its adherence to that principle in *Gonzales* just as it had done in *Barbara, supra*, and *Tobey, supra*. As in those cases,

Gonzales did not *change* the law; rather, it *applied* well-settled law to a new technique. Consequently, the decision in *Gonzales* was "adumbrated" by earlier rulings of the Supreme Court and does not constitute a new rule of law for purposes of determining the retroactivity of its application.

However, even if *Gonzales* announced a new rule of law, consideration of the *Hampton* factors convinces me that the rule should be applied retroactively. The purpose of the *Gonzales* ruling excluding testimony influenced by hypnosis is to preserve the integrity of the fact-finding process:

"We agree with the conclusion that the process of hypnosis and its outcome is inherently unreliable. Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse or prejudice." *Gonzales, supra*, p 626.

The *Gonzales* decision is intended, in other words, to ensure that guilt or innocence is properly ascertained. Retroactive application of this decision will serve this purpose. As the Supreme Court has said recently: "When a decision of this Court involves a rule which concerns the ascertainment of guilt or innocence, retroactive application may be appropriate, *People v Hampton* * * * ." *People v Young*, 410 Mich 363, 367; 301 NW2d 803 (1981). See also, *People v Markham*, 397 Mich 530, 535; 245 NW2d 41 (1976). *People v McGreevy*, 52 Mich App 52, 54; 216 NW2d 623 (1974).

The last two *Hampton* factors are interdependent and may be considered together. *Young, supra*, p 367. Because *Gonzales* overruled no earlier decision, there existed no "old rule" upon which the bench and bar may have relied. Moreover, the people have not presented to this Court evidence indicating that use of testimony influenced by hypnosis was widespread prior to *Gonzales*. Thus, retroactive application of *Gonzales* will not have a harsh effect on the administration of justice.

I conclude that the *Gonzales* ruling should be applied retroactively. Testimony received at defendant's trial was tainted by hypnosis and should have been excluded. As such, defendant was denied a fair trial and is entitled to reversal.

/s/ Richard M. Maher

